University of Dundee

DOCTOR OF PHILOSOPHY

“Green” public procurement policies, climate change mitigation and international trade regulation
an assessment of the WTO Agreement on Government Procurement

Malumfashi, Garba Ibrahim

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"Green" public procurement policies, climate change mitigation and international trade regulation: *An assessment of the WTO Agreement on Government Procurement*

Garba Ibrahim Malumfashi

Submitted In Partial Fulfilment of the Requirements for the Award of the Degree of *Doctor of Philosophy* in the International Law and Policy for the Environment, Energy and Trade

University of Dundee
Graduate School of Natural Resources Law, Policy and Management,
Centre for Energy, Petroleum and Mineral law and Policy (CEPMLP)
Dundee
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DEDICATION

To Three Special Personalilies:

Fatimah *Bint* Aliyu *(Mother, of blessed memory)*
Mallam Ibrahim Abubakr *(Father, of blessed memory)*

And

Honourable Justice Mamman Nasir (Rtd.)
(An "Institution", perfect in guardianship and mentoring)

DECLARATION

BY THE CANDIDATE:

I, GARBA IBRAHIM MALUMFASHI, do hereby declare that I am the author of this thesis; that unless otherwise stated, all references cited have been consulted by me; that the work of which the thesis is a record has been done by me, and that it has not been previously accepted for a higher degree.

Signed:

.....
Garba Ibrahim Malumfashi

BY THE SUPERVISORS:

It is hereby declared that the work presented in this Thesis is the work of the candidate GARBA IBRAHIM MALUMFASHI, and that in carrying out this work, the conditions of the relevant Ordinance and Regulations have been fulfilled.

Signed:

.....

Dr. Malaku G Desta

.....

Professor Peter D. Cameron

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"***Wa Akhiru Da'wahum Anil-Hamdu lillahi Rabbil-'Alameen***"

[And the close of their request is: All the praises and thanks are due to Allâh, the Lord of worlds]

(Q/10:10)

TABLE OF ABBREVIATION

AJIL	American Journal of International Law
APEC	Asia Pacific Economic Cooperation
BISD	GATT Basic Instruments and Selected Documents
CBD	Convention on Biological Diversity
CDM	Clean Development Mechanism
CGP	Committee on Government Procurement
CGS	Climate-friendly goods and services
CIEL	Centre for International Environmental Law
CSR	Corporate Social Responsibilities
CTE	Committee on Trade and Environment
DDA	Doha Development Agenda
DMD	Doha Ministerial Declaration
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Commission
ECJ	European Court of Justice
EGS	Environmental goods and services
EJIL	European Journal of International Law
EMIT	GATT Working Group on Environmental Measures and International Trade
ETS	Emissions Trading Scheme/System
EU	European Union
GATT	General Agreement on Tariffs and Trade
GEO	Global Environmental Organisation
GHG	Greenhouse gas

GPA	Agreement on Government Procurement
GPP	Green public procurement
IEA	International Energy Agency
IEL	International Economic Law
IPCC	Intergovernmental Panel on Climate Change
KP	Kyoto Protocol
MEAs	Multilateral environmental agreements
MTNs	Multilateral Trade Negotiations
NTBs	Non-tariff barriers
NTMs	Non-tariff measures
OJEU	Official Journal of the European Union
PPMs	Processes and production methods
TREMS	Trade-related environmental measures
RECIEL	Review of European Community & International Environmental Law
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on Human Environment
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WB	The World Bank
WEO	World Energy Outlook
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

ABSTRACT

This research examines the legal issues arising in the inter-relationship between climate change law and policy on the one hand, and international trade regulation on the other. The focus is government procurement. It looks at "green" government procurement (GPP) policies and practices used by the Parties to the Kyoto Protocol as a tool for climate change mitigation, and as it relates to these countries' obligations under the WTO Agreement on Government Procurement (GPA). GPP is government purchase practice that favours goods, services and service suppliers that are more climate-friendly and energy efficient over similar others that are less so. For example, under the EU GPP policy, for climate reasons, procurement authorities have a preference for *green* electricity (generated from renewable sources) as against the conventional fossil-based electricity. The two types of "electricities" are ordinarily same products as far as their *performance* is concerned, that is, at the *consumption* level. Discriminating between the two has the potential to raise serious issues of law at WTO level.

Under the WTO non-discrimination disciplines (GATT Arts. I and III, and GPA Art. III) product or service standards based on non-product related processes and production methods (PPMs) such as climate-friendliness should not serve to permit differentiation in treatment between "like" products. The general exceptions provisions (GATT Art. XX(b) and (g) and GPA Art. XXIII) however, may permit such climate-related differential measures if they are: (1) necessary to achieve the legitimate policy objective intended, (2) not applied in a discriminatory manner and (3) not a disguised restriction on international trade.

There are two issues of major concern to this study: First, there are textual discrepancies as between the GATT and GPA provisions related both to the non-discrimination norms and the exceptions, which may pose interpretation difficulties in the event of a dispute. Secondly, the provisions of GATT Art. XX (b) and (g) are interpreted to refer to *environment* in general terms. However, the current trend is to single out and address climate change separately from among other environmental problems of transboundary nature. This is in view of the urgency associated with the challenge it poses. Generally, also, in accordance with established WTO jurisprudence, the party who invokes the GATT Art. XX exceptions bears the burden to prove the measure in question as being covered under the exceptions. Some scholars suggest that this situation places at a *disadvantage* the subjects covered

by the exception provisions (in this case climate-related procurement). Examined, therefore, is not only the extent to which GPP practices can be accommodated under these exceptions, which are also in line with the WTO's recognition of the principles of sustainable development, but also whether climate-friendly procurement is best protected if expressly provided for as "positive norm" in the text of the GPA.

The Revised GPA 2007 (not yet in force) contains a new paragraph (Art. X:6) which explicitly permits the Parties to include environmental considerations in their procurement policies. This study argues that the revision would not fundamentally address the issues observed earlier. In order to avoid the interpretation difficulties envisaged, and to promote mutual supportiveness and coherence between the climate and trade regimes further amendment would be necessary to the text of Art. XXIII of the GPA to the general exceptions, or in the alternative, to Art. X:6 of the Revised GPA. The amendment should, subject to appropriate conditions, explicitly permit discriminatory GP measures meant to address climate change subject. This amendment would effectively shift the burden of proof from the Party maintaining the measure to the one complaining against it. In the final analysis, this research will contribute to the current discourse on what role the WTO may play in the efforts to fashion out new international climate policy to succeed the Kyoto Protocol to the UNFCCC by 2012.

PART I

GENERAL BACKGROUND TO THE RESEARCH

CHAPTER 1:

INTRODUCTION

1.1 The conceptual and theoretical background of the research

This research examines the interactions of the global legal regimes for climate change mitigation and international trade, in the area of government procurement (GP). While climate change is regulated by the United Nations Framework Convention on Climate Change of 1992[1] and the Kyoto Protocol[2], international trade is regulated at global level by the World Trade Organisation (WTO)[3]. GP is a subject-matter of the WTO, and is regulated by the WTO Agreement on Government Procurement (GPA),[4] a *plurilateral* agreement binding only those WTO Members that subscribe to it.[5] GP signifies the purchases of goods and services by

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[1] UNFCCC Secretariat, *United Nations Framework Convention on Climate Change* of 9 May 1992, 31 I.L.M. 849, (entered into force 21 Mar. 1994) [hereinafter, "the UNFCCC" or "the Convention"]. See *infra,*, Chapter 4, Section 4.4.1.

[2] Kyoto Protocol to the UNFCCC, 10 Dec. 1997, 37 I.L.M. 32 (1998) (signed at Kyoto, Japan, 1997, entered into force 14 February 2005) [hereinafter "the KP" or "the Protocol"]. See *infra,*, Chapter 4. Section 4.4.2.

[3] See *Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments-Results of the Uruguay Round vol. 31, 1915 U.N.T.S. 103*, available also at the WTO website: <http://www.wto.org/English/docs_e/legal_e/04-wto.pdf>. WTO operates the *General Agreement on Tariffs and Trade (GATT)*, an agreement signed in 1947 by some 23 countries. By 1994, 128 countries signed an up-graded GATT (known as GATT 1994) on the basis of which WTO was created on 1 January 1995. The WTO has since that date been the organization overseeing the multilateral trading system. As at December 2008 WTO has got 153 members. For more brief on the evolution of the WTO, see Chapter 3, and at <http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact4_e.htm>. On the current state of the WTO membership see *Understanding the WTO,* at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed 06/01/09).

[4] WTO, *Marrakesh Agreement Establishing the World Trade Organisation, Annex 4: Plurilateral Trade Agreements: Agreement on Government Procurement*, done at Marrakesh on 15th April 1994 entered into force I January 1996.

[5] A "Plurilateral" agreement as opposed to the "Multilateral" one is negotiated based on special sector and/or interest of WTO Members who wish to be parties thereof. It is more of a club for the like-minded, on an area of trade that is of particular interest or relevance to them. GPA is one of the four such agreements. The other three are: the *Agreement on Trade in Civil Aircraft* which entered into force on 1 January 1980, the *International Dairy Agreement* and the *International Bovine Meat Agreement*. The WTO General Council, however, at its meeting of 10 December 1997, deleted the *International Dairy and International Bovine Meat* agreements from Annex 4 of the *WTO Agreement,* with effect from 1 January 1998 (WT/L/251 and 252). They were deleted because the signatories decided that the sectors covered by the deteted agreements were better handled under the Agriculture and SPS agreements, respectively. See WTO, *Understanding the WTO: the Agreements Plurilaterals: of minority interest, at:* http://www.wto.int/english/thewto_e/whatis_e/tif_e/agrm10_e.htm (last visited: 06/04/10). The GPA has 39 Parties (including the 27 member-countries of the EU). Of this number, only 4 are developing countries. The basic disciplines of the GPA are discussed *infra,* Chapter 3, Section 3.4.

public authorities for the purpose of governmental functions. Thus, the focus of the research is to examine the legal issues arising out of the use of GP as a policy tool to promote climate change mitigation under the climate regime. Accordingly, the GPA is the centre of the discussions, even as other Agreements within the WTO system are also referred to as appropriate.

More specifically, the research investigates the concept of "green" government procurement (GPP)[6] used as climate change mitigation policy tool especially by countries that have higher climate change mitigation commitments under the UNFCCC and KP, and generally tighter environmental regulations. Public procurement authorities in those countries engage in GPP give preference for environmentally friendly and more energy-efficient goods, services and service suppliers, over others that are less so. Similarly, service suppliers are required by procurement authorities to show evidence of technical environmental qualifications or certification. This may disqualify otherwise capable suppliers who do not possess such formal qualifications. GPP practice thus potentially constitutes a trade barrier as it results in disproportionate impacts against products and services as well as producers and suppliers from countries with lower climate change mitigation commitments and lax environmental regulations.

The basis of the differential treatment between otherwise similar (or "like") products or services (or suppliers) is the climate-friendly attributes as considered from the manner they were produced (referred to in trade parlance as "the processes and production methods" or "PPMs").[7] Where these PPMs do not affect the physical

[6] While GPP refers generally to the incorporation of environmental considerations in the specification of goods and services to be purchased by public authorities, "climate-friendly" procurement denotes a targeted procurement policy with the objective of climate change mitigation, which is essentially the focus of this research.

[7] On PPMs, see *infra* Chapter 2, section 2.2.3 and Chapter 6, section 6.4.

characteristics or performance of the "products" or "services" [8] in their final forms, that is at consumption stage, differential treatment between them in GPP could amount to discrimination or protectionism not warranted by WTO rules. Discrimination and protectionism give undue favours to domestic products and services by shielding them from foreign competition.

GPP is one of the response measures taken pursuant to the Kyoto Protocol's call on the Parties to "implement and/or elaborate policies and measures" aimed at enhancement of energy efficiency, promotion of the development and increased use of new and renewable energy, as well as diffusion of environmentally sound technologies.[9] These measures are considered necessary to address the grave and urgent challenges posed by anthropogenic climate change.[10] Indeed, GP was cited by the Intergovernmental Panel on Climate Change (IPCC) as among the "environmentally effective" tools to address climate change.[11] This is moreso because of the huge expenditure by States, annually, for the purchase of goods and services used in everyday governmental functions. The share of public procurement

[8] In the case of service supply, the PPMs would refer to the manner of performance of the service. For instance, in a contract for delivery of climate-friendly municipal public transport service, a requirement that the vehicles should not only be energy efficient in their PPMs, but also in the manner they work. In the extreme, the contract may require that the supplier must use biofuels on the vehicles. See more on this, in Chapter 5 Section 5.2.2.

[9] Kyoto Protocol Art. 2(a)

[10] See IPCC, *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental* Panel *on Climate Change, 2007*, available at http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf . On the distinguishing features of the climate change problem, see *infra,* Chapter 4, Section 4.2.2.

[11] See IPCC, *Summary for Policymakers*, *Climate Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental* Panel *on Climate Change, 2007* [B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds.)], Cambridge University Press, Cambridge, United Kingdom, (Table SPM.7), p. 20. GPP practice can be seen in for instance, the EU green energy procurement system by which procurement authorities favour "green" electricity (generated from renewable power sources: hydro, wind, biomass or solar) over "brown" electricity (generated from the conventional fossil fuel sources). For a critical examination of the EU green energy procurement and trade law, see generally, Malumfashi, G. I., *Procurement Policies, Kyoto Compliance and the WTO Agreement on Government Procurement: The Case of the EU Green Electricity Procurement and the PPMs Debate,* in Cottier, T., *et al* (eds.), International Trade Regulation and the Mitigation of Climate Change, (World Trade Forum, Cambridge University Press, 2010).

in the developed economies represents between 15 and 20% of GDP.[12] For the EU, in particular, it is about 18% of the GDP.[13] Channelling this expenditure in the direction of climate friendly goods, services and technology will help reduce pressure on the environment, while also creating more business opportunities in that sector.

It ought to be stated, however, at the outset that the climate regime has cautioned, at an early stage, that such climate-motivated measures should "not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."[14] GPP however raises issues in particular with Art. III of the GPA which requires Parties to accord products and services, as well as service suppliers of other GPA Parties treatment no less favourable than that given to their own domestic products, services and suppliers. Similarly, Parties should not discriminate between goods, services and suppliers of other Parties selling or supplying in their domestic market.[15] These provisions are a reflection of the fundamental principles of non-discrimination provided under GATT Arts. I and III and GATS Art. XVII.[16] Consequently, GPP may set the climate and trade policies in potential collision. This thus exemplifies an aspect of the wider trade-environment debate which centres on how "to ensure the economic benefit of liberalised trade

[12] See *The Size of Government Procurement Markets*, OECD Journal on Budgeting, Vol. 1 No.4. The 2002 data for the OECD countries as a whole, government procurement, including consumption and investment expenditure, was estimated at 19.96% or $4 733 billion. For the non-OECD countries, the estimate was 14.48% or $816 billion.

[13] Other estimates put the GDP at 16% (equivalent to €1500Bn). See *Linking CSR to Public Procurement in the EU,* - Report from an ECCJ seminar and workshops at Stockholm, Sweden, 3 October 2007, available at: http://www.cora-netz.de/wp-content/uploads/eccj_spp_seminarreport.pdf (accessed last 23/06/09). See *infra,*, Chapter 3. Section 3.2.4.

[14] UNFCCC Art. 3.5 and KP Art. 2.3.

[15] GPA Art. III:1and 2

[16] These principles are: the most favoured-nation (MFN) and the national treatment (NT). The principles are the cornerstone of the WTO multilateral trading system. The MFN requires WTO Members to treat all goods and services of all WTO Members, bought or sold in their domestic markets, in the same way in terms of tax and other regulatory measures. NT, on the other hand, requires WTO Members not to treat goods and services of other Members less favourably than they treat their own goods or services. These MFN/NT requirements apply where the goods or services in question are "like". See *infra,* Chapter 3, Section 3.4.1.

whilst at the same time allowing states to take measures protective of the environment."[17] This debate led to the establishment, in 1995 of the WTO Committee on Trade and Environment (CTE)[18] which has served as the formal WTO forum for discussing the issues with a view to proffering solutions.

Going by the *Vienna Convention on the Law of Treaties*,[19] both the UNFCCC/KP and the GPA are "treaties"[20]. All treaties in force are equal in status,[21] and parties are bound to implement their treaty commitments in good faith as dictated by the doctrine of *pacta sunt servanda.*[22] Similarly, parties to treaties should not act pursuant to one treaty in such a way as to undermine the provisions of another treaty in force.[23] Thus pursuant to the principle of effectiveness in treaty interpretation *(ut res magis valeat quam perea)*, norms within a treaty should be interpreted in such a way as to complement and not conflict with one another.[24]

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[17] Kunzlik, P., *Green Procurement under the New Regime,* in Neil, R., and Treumer, S. (eds.), The New EU Public Procurement Directives, (Djof Publishing, Copenhagen, Denmark, 2005), 117. See also Zarilli, S., *WTO Doha Declaration and Trade in Energy Goods and Services,* OGEL Issue 1, January 2003, p.3 (available on www.gasandoil.com/OGEL). See also *infra,* Chapter 5, Section 5.4.1.1.

[18] See WTO, *Ministerial Decision on Trade and Environment* (WTO Document G/C/W/432/Rev.1, 24 February 2003) (hereinafter *"the Decision on Trade and Environment"*, available at http://www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm (last accessed: 10/07/10). See *infra,*, Chapter 2, Section 2.2.2.3.

[19] *Vienna Convention on the Law of Treaties,* Done at Vienna on 23 May 1969 (entered into force on 27 January 1980), UNTS, vol. 1155 (hereinafter, "the VCLT").

[20] The VCLT Art. 2(1)(a) defines a "treaty" as *"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."*

[21] This is subject to the VCLT Art. 30 on the principles regulating the application of successive treaties relating to the same subject-matter. These principles generally provide thus: (1) a later rule should prevail over an earlier rule (*lex posterior derogat legi priori*), and (2) a special rule prevails over a general rule (*lex specialis derogat legi generali*). On this see generally, Pauwelyn, J., Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law, (New York: Cambridge University Press, 2003).

[22] VCLT Art. 26: *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

[23] *Ibid*., Art. 31(3)(c).

[24] See *Japan - Taxes on Alcoholic Beverages* Appellate body Report, WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, (Adopted November 1, 1996) [Hereinafter. "*Japan — Alcoholic Beverages (ABR) II"]*, ps. 12 and 18. *See also* Pauwelyn, J., *supra,* n. 21 at pp. 249 – 251.

The GPA under Art. XXIII, however, provides for general exceptions which, inter alia, permit procurement measures considered "necessary to … protect human, animal or plant life or health." These exceptions are comparable to, but not identical with, those of the GATT Art. XX (b) and (g) generally interpreted to permit measures otherwise GATT-inconsistent, on grounds of environmental protection. The striking difference between the GPA and the GATT versions however, is that the GPA version does not include the equivalent of paragraph (g) of Art. XX (permitting measures aimed at "conservation of exhaustible natural resources").[25] The questions therefore are: to what extent is GPP discriminatory contrary to the GPA Art. III, and whether the exceptions could provide policy space for the GPA parties to pursue climate change agenda through GPP? Many commentators consider the possibility of GPP being accommodated under the GPA exceptions.[26] For example, Aaron Cosbey,[27] referring to the exceptions, believes that there is some "scope in the GPA for this sort of [GPP] discrimination, even perhaps on the basis of how a good is produced."[28] Similarly, Richard G. Tarasofsky holds the view that GPA Art. XXIII, "as suggested by the jurisprudence around GATT Art. XX, may cover measures aimed at tackling climate change – having multilateral cover, through the Kyoto Protocol, could contribute to the defence of the measure."[29]

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[25] See Hufbauer, G. C., Charnovitz, S. and Kim, J., Global Warming and the world Trading System, (Peterson Institute for International Economics, March 2009), p. 72 at footnote 13.

[26] Indeed, even the OECD, while acknowledging the concerns over GPP compatibility with GPA non-discrimination rules, also appeared confident that the exceptions could come to the rescue. See OECD, *Report on Trade and Environment to the 1999 OECD Ministerial Council Meeting* (C/MIN(99)14) at p, 8available at http://ec.europa.eu/environment/integration/pdf/oecd_te_1999.pdf .

[27] See *A Scoping Paper produced for the Trade Ministers' Dialogue on Climate Change Issues*, Held in conjunction with UNFCCC COP 13, Kyoto Protocol MOP 3 Bali, Indonesia, December, 9, 2007 by International Institutes of Sustainable Development (IISD) (available at: http://www.iisd.org/pdf/2007/trade_climate_linkages.pdf (last accessed 15/04/09).

[28] See *Ibid.* at p. 6 at www.iisd.org (last visited: 08/01/09). The problem was also highlighted by Conrad, C. R., *The status of measures linked to non-physical aspects and processes and production methods (PPMs) in WTO law A contribution to the debate on the impact of WTO law on national regulation pursuing social goals* [PhD Thesis submitted to University f Berne, Switzerland, July 2008 (unpublished, on file with author)], pp 42-43.

[29] See Tarasofsky, R. G., *Trade, Competitiveness and Climate Change: Exploring the Issues*, available at: www.chathamhouse.org.uk/sustainabledevelopment (last accessed: 08/01/10)

There has so far been no WTO dispute based on a discriminatory climate-friendly procurement measure, and thus no jurisprudence available on this specific issue. Thus, in the event of such a dispute, one could preliminarily suggest, on the basis of the jurisprudence based on GATT Art. XX(b) and (g), that GPP, as an environmental measure taken pursuant to another multilateral treaty (Kyoto Protocol), could be accommodated under the GPA Art. XXIII exceptions.[30] The jurisprudence referred to as supporting this suggestion is the interpretation of the exceptions given by the GATT/WTO judicial authorities in a number of rulings.[31] For instance, the AB in the *US – Shrimp*,[32] over-turning earlier GATT Panel rulings in the *US – Tuna/Dolphin* disputes,[33] interpreted the GATT Art. XX(b) and (g) to include measures maintained to protect the environment.[34] To the same effect also, the AB ruled in *EC – Asbestos*[35] that WTO Members were entitled to maintain otherwise GATT-inconsistent measures to protect the health of their citizens.

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[30] However the multilateral cover of the Kyoto Protocol is not necessarily a justification for a WTO-inconsistent climate friendly measure. The disputing parties must ratify that non-WTO rule before it becomes relevant See *infra,* Chapter 7, section 7.3.2.1. See Martin, M., *Trade Law Implications of Restricting Participation in the European Union Emissions Trading Scheme,* Georgetown International Environmental Law Review, Vol. XIX, Issue 3, Spring, 2007, at pp. 35-36.

[31] These include: *United States–Taxes on Petroleum and Certain Imported Substances*, L/6175, GATT Panel Report, adopted 17 June 1987, BISD 34S/136 [hereinafter, *"US – Superfund"]; United States – Standards for Reformulated and Conventional Gasoline*, Panel Report, WT/DS2/R, 29 January 1996, modified by Appellate Body Report, 29 April 1996, WT/DS2/AB/R, adopted 20 May 1996 [hereinafter, *"US – Gasoline (ABR)"*]; *European Community—Measures Concerning Meat and Meat Products*, Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R (adopted, January 16, 1998) [hereinafter "*EC – Hormones (ABR)"*]. See also Picciotto, S., *The WTO's Appellate Body: Legal Formalism as a Legitimating of Global Governance'*, Governance, vol. 18, issue 3, summer 2005), pp. 10-11, n. 23, Doelle, M., *Climate Change and the WTO: Opportunities to Motivate State Action on Climate Change through the World Trade Organization,* RECIEL 13 (1) 2004.

[32] *United States–Import Prohibition of Certain Shrimp and Shrimp Products,* Appellate Body Report, *WT/DS58/AB/R*, adopted 6 November 1998, DSR1998:VII, 2755 [hereinafter *"US – Shrimp (ABR)"*].

[33] *United States -- Restrictions on Imports of Tuna,* GATT Panel Report, General Agreement on Tariffs and Trade: Basic Instruments and Selected Documents (hereinafter GATT, BISD) 39S/155, reprinted in 30 ILM (1991) 1594 (US - Tuna/Dolphin I); GATT Panel Report, *United States -- Restrictions on Imports of Tuna*, 16 June 1994, GATT Doc. DS29/R, reprinted in 33 ILM (1994) 839 *(US - Tuna/Dolphin II).*

[34] See *infra,*, chapter 2, section 2.2.2.1

[35] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* Appellate Body Report WT/DS135/AB/R [hereinafter *"EC – Asbestos"].* See also the application of the exceptions for the protection of public morals under the GATS: *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Report of the Appellate Body, WT/DS285/AB/R [hereinafter, *"US – Gambling (ABR)*"].

Then, came *Brazil – Tyres,*[36] the most recent of the trade-environment disputes in the WTO, where the AB re-affirmed its rulings in *US – Shrimp and EC - Asbestos*. Indeed, as observed by Van Calster[37] reviewing the *Brazil – tyres* ruling, the WTO jurisprudence in this regard had developed over time from the mere recognition of the environment or health as accepted regulatory arena for the WTO Members, more to the manner the regulatory measures are fashioned and implemented. Thus, it is not enough that a measure in contention is intended for either environment or health protection; it has much more to do with the extent the conditionalities of the *chapeau* to the GATT Art. XX, which safe-guards against abuse of the permission, could be satisfied.[38]

On the other hand, from the existing literature,[39] it still remains uncertain whether the GATT Art. XX(b) and (g) interpretation could be automatically adopted to cases brought under GPA Art. XXIII:2. The bulk of the literature still discusses controversies surrounding the real legality of GPP as well as many other climate policy instruments, under the WTO. The question cited earlier, of textual disparity between the the GPA Art. XXIII:2 on the one hand, and those of the GATT Art. XX(b) and (g) provisions on the other, brings into perspective the relationship between the GATT and GPA generally. As the GPA does not contain a provision equivalent to (g), could the GATT Art. XX(g) be applied to fill in the lacuna in the GPA? If not, will the disparity affect the permissibility or otherwise of GPP under the

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[36] See *Brazil – Measures Affecting Imports of Retreaded Tyres* Report of the Panel WT/DS332/R (12 June 2007)/ [as modified by AB:] WT/DS332/AB/R, adopted 17 December 2007 [hereinafter *"Brazil – Tyres (ABR)"*].

[37] See generally, van Calster, G., *Faites Vos Jeuxç Regulatory Autonomy and the World Trade Organisation after Brazil Tyres*, Journal of Environmental Law 20:1, Advance Access: 11 February 2008 [Oxford University Press, 2008]. See *infra,* Chapter 2 Section 2.2.2; Chapter 7, Section 7.

[38] *Ibid.*

[39] See for example, Matthias, B., M., and Verheyen,.R., *International Trade Law and Climate Change – A Positive Way Forward,* (FES-Analyse: International Trade Law and Climate Change, July, 2001), available at: http://library.fes.de/pdf-files/stabsabteilung/01052.pdf last visited 03/07/09; Van Asselt, (et al), *Greener public purchasing: opportunities for climate-friendly government procurement under the WTO and EU rules,* Climate Policy 6 (2006), pp. 217-229, van Asselt, H., *Green government procurement and the WTO,* (Institute for Environmental Studies: 2003) and Van Calster, G., *Green Procurement and the WTO- Shades of Grey,* RECIEL 11 (3) 2002 (hereinafter, "Van Calster, *Shades of Grey").*

GPA? This omission thus may add to the uncertainty about the adequacy of the exceptions to cater for climate-related procurement measures.

These questions also lead to the issue of the 2006 revision of the GPA which has now produced the Revised GPA 2007 (hereinafter, "Revised GPA"). The Revised GPA has retained the Art. XXIII:2 exceptions as they are, but introduced a new provision under Art. X:6 by which it explicitly permits procuring authorities to use government procurement tools "to promote the conservation of natural resources or protect the environment."[40] For the start, this new text austensibly fills in the lacunae created by the omission of the Art. XX(g) equivalent (even without the word "exhaustible" to qualify natural resources), in Art. XXIII:2.

As the GPA Art. XXIII:2 is still retained in the Revised GPA, this situation has two effects, namely: (1) the "environment" aspect of the GPA Art. XXIII: renders redundant the new Art. X:6.[41] and (2) the existence of the two provisions in the same instrument creates a problem as to placement of burden of proof. It is an established principle under the GATT/WTO jurisprudence that a party asserting an exception has the onus to prove it.[42] The question therefore is if a GPA Party maintains an environmental measure as a positive norm under the new Art. X:6, who bears this burden? Moreover, the new Art. X:6 is a blanket provision devoid of conditionalities, hence susceptible to abuse. As it currently is, the provision potentially opens opportunities for GPA Parties to maintain all sorts of measures

[40] The *Revised GPA 2007* is available at: http://www.wto.org/english/tratop_e/gproc_e/negotiations_e.htm (last accessed: 24/06/09). The Art. X:6 reads: *"For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment."*

[41] This is because the GPA Art. XXIII on the general exceptions provision addresses other issues in addition to the environment too. So if one of the two provisions is to be removed, it will naturally be the "environment" aspect of the GPA Art. XXIII.

[42] See generally, Grando, M. T., *Allocating the burden of proof in WTO disputes: a critical analysis* JIEL 9(3), 615–656 (Oxford University Press, 2006). See also. *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS33/AB/R and Corr.1, adopted 23 May 1997 [hereinafter "*US – Shirts and Blouses"]; US – Gasoline* (ABR), p. 21, *supra* n. 31.

and claim them as "environmental". As the intention is clearly to allow for environment-motivated procurement measure this confusion could argually be avoided by enlarging the GPA Art. XXIII exceptions with a (g) part of the GATT Art. XX. But then, even if this suggestion is acceptable, it still leaves unsolved the bigger question whether the GPA effectively accommodates climate-motivated procurement policies. This is because, placed within the confines of the environmental exception provisions of the GPA, GPP practitioner countries have the onus to prove that the climate-motivated procurement policies are covered under the exceptions, are necessary, and must comply with the *chapeau*.

A particular concern of this research, in this regard, is that requiring climate-related procurement practitioner-countries under the rigorous burden of proof process may negate the urgency associated with the need to tackle the climate change challenge. That is to say, while the term "environment" is omnibus, climate change problem poses special, enormous and urgent threat to global well-being. Thus, efforts by a GPA Party to control climate change should be considered as delivering and enhancing global public good[43] which should earn commendation and encouragement rather than "punishment" of a sort, namely, with imposition of the burden of proof. This positive gesture can be encouraged by insulating climate-motivated procurement from the exceptions under GPA Art. XXIII, and instead inserting a new provision that permits such procurement policies as aimed at achieving climate change mitigation ends.[44] This will, inter alia, effectively, shift the burden of proof to any Party complaining of an alleged "discrimination" or

[43] Carraro, C. and Egenhofer, C., *Bottom-up approaches to climate change control: some policy conclusions,* in Carraro, C. and Egenhofer, C. (eds.), Climate and Trade Policy Bottom-up Approaches Towards Global Agreement, Edward Elgar, (Cheltenham, United Kingdom, 2007), pp. 116-120, at p. 116. See also See Andrews-Speed, P. *China and Global Climate Change: contrasting views,* (CEPMLP Research Gateway, July, 2007) available at https://my.dundee.ac.uk/webapps/portal/frameset.jsp (last visited 30/01/08).

[44] This is probably similar to a question being discussed of recent on the International Economic Law Blog, on the US green car production subsidy, namely, whether "*WTO rules need to be modified so that subsidies to promote a cleaner environment are explicitly permitted?"* See International Economic Law Blog, http://worldtradelaw.typepad.com/ielpblog/2009/06/green-car-subsidies.html (accessed on 26/06/09).

"protectionism" suffered on account of those measures. To prevent an abuse of such a positive norm, appropriate conditions could be attached to it.

This approach can be likened to the case of the Enabling Clause, which is an exception to GATT Art. I:1 on MFN obligation, but was raised to the status of a norm as in *EC — Tariff Preferences.*[45] The AB here considered the developmental motive and design of the *Enabling Clause* as entailing peculiar kind of "exception" to the GATT Art. I.[46] The same approach is desirable for climate change, which is a developmental as much as it environmental phenomenon too.[47] According to the UN Secretary-General Ban Ki-moon, the adverse impacts of climate change "could undo much of the investment made to achieve the Millennium Development Goals."[48]

1.2 The research questions

Following from the above, the questions for this research, therefore, are as follows:

1. In pursuing *green* government procurement policies pursuant to their climate change mitigation commitments under the climate regime, how will the GPA Parties also safeguard their non-discrimination and related obligations under the GPA?

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[45] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* Appellate Body Report,, WT/DS246/AB/R (April 7, 2004) [hereinafter, *"EC – Tariff Preferences (ABR)"*].

[46] *Ibid.*, paras. 106- 118, See also Chapter 7, Section 7.4.

[47] The WB regards the climate change as a "key-development" issue which also is "expected to hit developing countries the hardest". See WB, *Climate Change & the World Bank*, at http://beta.worldbank.org/climatechange/overview (last accessed 11/10/09). An example is the Sub-Saharan Africa, with its special vulnerabilities. See *Making Development Climate Resilient: A World Bank Strategy for Sub-Saharan Africa Overview* (available at http://siteresources.worldbank.org/INTAFRICA/Resources/Overview_of_Strategy.pdf (last visited 04/07/10).

[48] See the UN Secretary-General Ban Ki-moon's address to the high-level event on climate change in New York, today, 24 September available at: http://www.un.org/News/Press/docs/2007/sgsm11175.doc.htm (last accessed 20/06/10). Kofi Annan and Sir Nicholas Stern also reiterated that solution to climate change is "fundamental to the success of economic growth and achievement of the millennium development goals." See *A green deal for Africa,* in The Guardian, 15 May 2009 at http://www.guardian.co.uk/commentisfree/2009/may/15/climate-change-africa (accessed on 16/05/09).

2. To what extent does the current version of GPA Art. XXIII:2 accommodate climate-motivated government procurement practices? Or will there be need for an amendment?[49]

In effect, the research questions not only seek to determine whether discriminatory GPP measures are compatible with the trade rules, but also consider if, climate-friendly procurement policies would be more effective if be permitted as a positive "norm" rather than under the general exceptions as the situation currently is, under the GPA.

1.3 Research objective and motivation

The objective of this research is broadly to examine the legal issues arising in the intersections of GP policies targeted at climate change mitigation and the WTO GPA. It is motivated by the desire to exemplify GPP as one of the areas to achieve mutual supportiveness between different sub-sectors of international law, in accordance with the general principles of international law as enunciated in the VCLT.[50] The target is "to address the question how, in developing and interpreting WTO rules, an appropriate balance can be maintained between on the one hand, GPA objectives of non-discrimination and transparency and, on the other, the freedom of national governments to pursue legitimate domestic objectives"[51], including those of climate change mitigation."

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[49] Voices have since started emerging that to the effect that in order to adequately cater for the urgency associated with the efforts to address climate change, these provisions need to be amended. See for instance, Tucker, T. and Bottari, M., **,** *Presidential Candidates' Key Proposals on Health Care and Climate Will Require WTO Modifications Overreach of WTO Highlighted by Potential Conflicts with Candidates' Non-Trade Proposals,* (Public Citizen's Global Trade Watch, 2008), p. 16, available at: http://www.citizen.org/Page.aspx?pid=2131 *["Trade," Energy and Climate Change Policy"].*

[50] For instance, the general principles of international law do not, hierarchically, place one sub-sector of international law over another, and require treaties to be interpreted so as to avoid conflicts between them. See, for instance, Art. 31 of the VCLT on the interpretation of treaties, and Art. 26 on the principles of good faith and *pacta sunt servanda*. For in-depth discourse on this subject, see generally, Pauwelyn, J., *supra* n. 21; See also Lindros, A. and Mewling, M., *Dispelling the Chimera of Self-Contained Regimes' International Law and the WTO*, Euro J Into Law 16 (2005) pp. 857-877.

[51] As per Arrowsmith, S., Government Procurement in the WTO, (Lower International, The Hague, The Netherlands: 2003), p. xxii.

1.4 Justification

Climate change is increasingly being singled out and treated separately from the myriad of other environmental problems. This research attempts to reflect this phenomenon. The emerging GPP practice targeted at climate change exemplifies an area where environmental policies and trade rules interact. As this interaction at times leads to conflicts, a systematic study devoted to finding ways to establish coherence and harmony between the conflicting norms is clearly needed. This study therefore aims to contribute to the development of the critical literature in this area.

1.5 Methodology

1.5.1 Analytical framework

The Concept of WTO linkages with "Non-Trade Concerns": As the research examines a perceived conflict between two separate sub-sectors of international law, namely climate and trade regimes, this brings into focus the question of how WTO relates with other values and concerns. These concerns may be subjects of other treaties. As noted earlier, the VCLT has provided the applicable guiding principles regulating interrelationships between treaties. However, as WTO is taken to have recognised environmental concerns, then analysis will be targeted essentially at examining the extent to which this recognition applies to the emerging climate-friendly procurement policies.

On the climate change aspect, analysis will be focused on specific provisions of the UNFCCC and KP which require the Parties to institute policies and measures, to control GHG emissions pursuant to their specific commitments. The relevant sections of the treaties include Articles 3 and 4 of the UNFCCC and Articles 2 and 3 of the KP. On the trade aspect, the main relevant Articles for this purpose are GPA Articles III, VI as well as Art. XXIII.[52] Analysis will be targeted at identification of

[52] See Appendices I – IV. Indeed, Art. X:6 of the Revised GPA 2007 (GPA/W/297) is also relevant.

conflicts or overlaps between the two regimes. And based on the principles enunciated in the VCLT, the analysis will suggest an interpretation that will harmonise the conflicting or competing provisions with a view to facilitating a coordinated implementation by Parties.

1.5.2 Methods: The Doctrinal/Black-Letter Approach

The research employs essentially the doctrinal method otherwise referred to as "black-letter" approach. This approach seeks to define what the law is, and how it is interpreted and applied through decided cases.[53] However, because the research touches upon other disciplines in social sciences, such as economics, the black-letter approach is complemented by an interdisciplinary and critical legal approach too. Thus, the research is concerned with not only the legal texts, and decided cases but also the problems associated with the everyday application of the law, as well as the impact of the law on policy-making. This leads to assessment of the legal texts vis-à-vis the policy thrusts behind them. The purpose is to investigate the efficacy of the texts, and assess the need for improvement of the texts and where amendment would be desirable if the law is to serve its purpose effectively.[54]

As dispute settlement is "the best measure"[55] to assess how trade rules relate with other sub-sectors of international law at large, the research examines available jurisprudence under the GATT and WTO as well as under the EU system. Thus, although the research assesses the GPA, it uses EU law and policy related to GPP to serve as an illustration. The purpose of this illustration is to practically exemplify

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[53] See Dobinson I., and Jones, F., *Qualitative Legal Research,* in Research Methods for Law, edited by McConville, M., and Hong Chui, W. (University of Edinburgh Press Ltd, United Kingdom, 2007), pp. 16-45.

[54] *Ibid.*, p.19. See also Brownsword, R., *An Introduction to Legal Research*, revised version of the paper prepared for a Welcome summer school on neuroethics, held at St Anne's College Oxford, September 2005, available at: http://www.wellcome.ac.uk/stellent/groups/corporatesite/@msh_grants/documents/web_document/wtx030897.pdf (last visited 07/08/10).

[55] *See* Lindros, A. and Mewling, M., supra, n. 50, p. 858.

where and how the WTO-related legal issues and questions arise in GPP processes. The choice of EU system is based on the following considerations:

1. EU and its member countries are individually and collectively within the Annex I list of the UNFCCC. At the same time, the EU is a Party to the GPA. Therefore, the EU has been faced with the task of how to reconcile trade liberalisation constraints within the Union, with the high environmental standards, and in particular the ambitious GHG emissions reduction commitments under the KP.
2. The EU has a *green* energy procurement policy as a component of its over-all climate change and energy policy. This is a reflection of the EU "integration principle" contained in Art. 6 of the EC Treaty.[56]
3. While there is still not much reference material on GP under the WTO system, GPP-related jurisprudence is fast developing under the EU procurement system.

1.6 Limitations

This work has limitations in terms of its subject-matter and working tools. As for the subject-matter, the research, though related to economics (in terms of international trade) and natural sciences (climate change and global warming), it is neither economics nor natural sciences-based work. It is essentially a legal analysis, dealing with the international law, policies and regulations related to climate change mitigation, energy, as well as international trade regulation, with a focus on GP. Similarly, as GPP is an element of sustainable procurement, the study does not incorporate other components of sustainable development, namely, economic and social issues. The reason is to ensure narrower focus and depth of analysis within the confines of the available time and space. Finally, the study is also constrained

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[56] The "integration principle" is incorporated in Art. 6 of the EC Treaty. That Art. requires that:

> *[E]environmental requirements must be integrated into the definition and implementation of other Community policies in particular with a view to promoting sustainable development"*

The "integration principle" thus imposes legal obligation upon the EU Member States. See the Opinion of the Advocate General Jacobs, in *Case C- 379/98 PreussenElektra AG v. Schleswag AG [20010 ECR 1-2099,* para. 231.

by unavailability of relevant academic literature addressing the specific research questions. This is probably because the subject-matter of the research is still in its experimental stage. There are however vast materials on the other relevant aspects, and in particular, on issues related to the wider trade environment debate. Thus, these materials will be used to draw inferences and analogies to address the specific issues covered by the research questions. This study therefore hopes to contribute to fill in this gap in the literature.

1.7 Structure

The research is organised in 8 chapters which are divided into 3 parts. ***Part 1*** which consists of chapters 1 and 2, sets the general research background. **Chapter 1** highlights the main features of the research, including research questions, objectives, justification and limitations. This chapter in short gives an overview of the whole study. **Chapter 2** surveys and reviews the relevant literature which helps to properly give focus to this research.

Part 2 comprising chapters 3, 4 and 5, establishes linkages between the various sub-themes around which the research revolves. These are international trade law and the regulation of public procurement; the linkages of international regimes for climate change, environment and the energy sector. Thus, **Chapter 3** lays the conceptual foundation and importance GP as well as the evolution of the regulation of GP, including an overview of the GPA**. Chapter 4** explores the linkages between climate change mitigation regime, the energy sector and green procurement. **Chapter 5** examines the institutional aspects of GPP and reviews the global and national initiatives for GPP. It lays the ground for the argument why climate-motivated GP, so widely accepted and practiced, should be regarded not only as a "legitimate policy objective" but also an environmental activity area which deserves special attention under the trade law.

In ***Part 3,*** **Chapters 6, 7 and 8** examine the technical legal issues raised for and against GPP. The Chapters also discuss the possible policy space available under the existing trade law for countries to pursue GPP, and the potential technical legal difficulties to be encountered from the GPA. **Chapter 6** elicits the PPMs debate within the context of the broader trade-environment debate. It analyses the WTO case-law and jurisprudence as well as the EU procurement law and policy on the issues. Further analysis in **Chapter 7** led to a conclusion which suggests amendment to the GPA. The amendment aims to suggest the GPA as a medium by which the WTO could support the objectives of the fight against climate change, and the overall need for coherence between trade regulation and environmental protection policies. Finally, **Chapter 8** draws conclusions from the discourse, as well as offers research recommendations including suggestions for further research.

1.8 Summary

GPP, as a climate policy tool exemplifies an area of interaction between trade and the environment which has been a subject of intense debates in the academia and by policy makers. The climate change has gained recognition as a special global environmental problem, the solution to which requires not only a multilateral approach, but also utilization of all available avenues in the overall polity. GP seen as an avenue to mainstream sustainable development factors in international trade regulation is feared as discriminatory. Climate change and the trade arenas are both regulated by treaty law, and their interpretation is guided by the international law principles as enunciated under the VCLT. This therefore presupposes a harmonious interpretation that will allows countries to pursue the objectives of the two regimes in a coherent manner. To ensure this coherence and harmony as between GPP policies and GPA provisions, the research suggests an amendment to the GPA so as to permit countries to maintain procurement policies specifically targeted at climate change mitigation. It shows how, through amendment to the legal texts, the WTO trade liberalisation mission could be more amenable and responsive to

climate change mitigation. This will further allow the WTO to perform its role of contributing towards "achieving coherence in global economic policymaking",[57] as enunciated under Art. V:1-2 of the WTO Agreement.[58]

[57] See WTO, *Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic policymaking*, by Minister in Marrakesh on 15 April, 1994. See also WTO Secretariat, Guide to the Uruguay Round Agreements, 15-16 (Kluwer Law International, The Hague, The Netherlands, 1999).

[58] *Ibid.*

CHAPTER 2:

REVIEW OF THE LITERATURE

2.1 Introduction

This chapter aims to highlight the current state of the literature on the interactions between GPP, climate change and trade regulation. In order to do that it was considered necessary to examine the trade-environment interactions in some detail and from an historical perspective. This brought into focus the long-standing debate on trade and environment[59] that has attracted major interest in academia from legal, economics and international relations perspectives. While government procurement (GP) is a subject of international trade, the *greening* of government procurement falls within the purview of environmental protection agenda.

With the emergence of sustainability principles especially after the adoption of the Agenda 21 at the 1992 United Nations Conference on Environment and Development (UNCED),[60] climate change challenge has taken a centre stage. Agenda 21 urged that environmental and sustainability concerns should be integrated into all economic development policies.[61] This call became imperative especially for the UNFCCC Parties and particularly those that ratified the KP. Accordingly, the EU and such other jurisdictions having high climate commitments

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[59] Environment is just one out of a host of issues which fall under domestic social and regulatory agenda of the WTO parties. They are referred to as "trade and ..." issues. Environment is probably the most controversial among them, in international trade regulation. Those other sub-themes include human rights, labour standards, and national competition policies, in which the WTO's position (or lack of it) has been subjected to scrutiny. The "Trade and…" theme has been the subject of a scholarly symposium on *The Boundaries of the WTO*. See Alvarez, J. E. (ed.), in AJIL, Vol. 96, No. 1, 2002.

[60] See *Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) Annex I: Rio Declaration on Environment and Development* (A/CONF.151/26 (Vol. I) (hereinafter "the Earth Summit" or "Rio Declaration" or "Agenda 21"), available at: <http://www.un.org/geninfo/bp/enviro.html> <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. See also UNEP at http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&Art.ID=1163 (last accessed: 03/08/09). See *infra,*, Chapter 4

[61] See *Ibid.* Agenda 21, Chapter 8

under the said Protocol, regard government procurement as a potent tool not only to integrate the environment but also to pursue their climate change agenda. GPP thus features prominently in the EU's climate change strategy.[62]

Indeed, even the WTO and sister multilateral institutions like the World Bank have started to officially treat climate change separately from other environmental issues hitherto lumped together under the omnibus title of "the environment".[63] Similarly, some national governments committed to climate change including the United Kingdom, have created government departments or assigned cabinet ministers specifically to deal with climate change issues.[64] There are so many reasons identified for this special status of climate change. Basically, there is close interaction between climate change and the energy sector which is the driving force of economic development.[65]

Following from the research questions stated in chapter 1,[66] this chapter seeks to look at earlier works done related to the position of GPP motivated by the Kyoto emissions reduction commitment, under the WTO GPA. The review finds generally, that although there has been some work done in the area of GP as a subject, little work has been done in establishing the linkages of GPP and the WTO law and policy. In order to appreciate the concept of GPP in the context of trade regulation it is pertinent to elicit the content and essence of the trade-environment debate, and in the light of the GATT/WTO jurisprudence on the GATT Art. XX(b) and (g).

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[62] See *infra,* Chapter 6, Section 6.4.

[63] See WTO-UNEP, Trade and Climate Change (WTO, 2009), available at: <http://www.unep.ch/etb/pdf/UNEP%20WTO%20launch%20event%2026%20june%202009/Trade_&_Climate_Publication_2289_09_E%20Final.pdf >. See also WB, International Trade and Climate Change - *Economic, Legal, and Institutional Perspectives* (The World Bank, Washington DC, USA, 2007).

[64] In 2008, the UK government upgraded the Department of Energy to include climate change matters, and renamed it as: *Department of Energy and Climate Change*. See http://www.decc.gov.uk/ 1. Meanwhile, other environmental matters are retained with the Department of Environment, Food and Rural Affairs.

[65] On the interaction between climate change and the energy sector, see Chapter 4 Section 4.3.

[66] See *supra*, Chapter 1 Section 1.2

The chapter is divided into three sections; the next section looks at the literature covering the various sub-themes of the research, namely: (a) The trade-environment interaction and the state of the debate, with particular attention given to AB reports in *US – Shrimp*,[67] and more specifically, in *US - Gambling* and *Brazil – Tyres* disputes[68]; (b) GPP and the WTO rules, and (c) GPP under the EU system and lessons for the WTO GPA. The review is finally concluded with observations and synthesis of the gap in the literature which the research seeks to address.

2.2 The research sub-themes in the light of the literature

2.2.1 Trade and the environment interaction: an overview

It is pertinent before discussing GPP in the context of trade regulation, to give an overview of the wider debate including brief history of this interaction since the GATT days through to the WTO era. The debate has been described succinctly by Taira[69] as follows:

> "On the one hand, *environmentalists* argue that the values of free trade conflict with the values of the environment… [Trade] liberalization creates new market opportunities and enhances economic activity [...] But freer trade and economic growth, if they go without fair payments of costs ("internalization"), result in the unsustainable consumption of natural resources and waste production and lead to increased pollution and other environmental harm ("externality"). Trade agreements contain market access provisions that can be used to override domestic environmental regulations…. Countries with lax environmental standards have competitive advantage in the global market place and put pressure on countries with high environmental standards to reduce their environmental requirements. TREMS [trade related environmental measures] make it possible for those

[67] *US – Shrimp (AB)* supra, n. 32;

[68] *US – Gambling (ABR)* supra, n. 34, and *Brazil – Tyres, supra,* n. 36.

[69] Taira, S., *Live with quiet but uneasy status quo? – An evolutionary role the appellate body can play in resolution of "trade and environment" disputes*, in Holmann, H. (ed.), Agreeing and implementing the Doha Round of the WTO, (Cambridge University Press, Cambridge, United Kingdom, 2008), pp. 420-437.

> countries to avoid such pressure …. On the other hand, *free traders mainly argue* as follows: environmental values and trade are complementary and the later serves the former. If consumption of a country's environmental resources is correctly priced, liberal trade improves a country's overall welfare and leads to a more efficient use of natural resources."[70]

From the above, one can say that the issue surrounding the trade-environment debate broadly, from the legal perspective,[71] concerns whether, and to what extent TREMS may be used to protect the environment. More specifically, to what extent can states unilaterally adopt a trade measure pursuant to an international environmental treaty (like the Kyoto Protocol), to protect the environment where such a measure infringes international trade law? When is unilateralism illegal (even if desirable for the protection of the environment), and when is it not? In sum, therefore, the argument of the thesis essentially revolves around this hypothetical:

> *Country **A,** a GPA Party, pursuant to its climate policy, incentivises mass generation of green electricity as well as electric-motored vehicles which would run on 50% energy from battery and the remaining 50% from gasoline. **A** then requires that 50% of all government vehicles in each ministry, parastatal or department to be electric-motored, and the remaining 50% to use green energy for at least 50% of their fuel; **A** then places a standing tender to purchase, for its use, all the vehicles produced with the above specifications. **A** also commits all energy procurement entities to ensure procuring the needed green energy for the stated purpose, namely, to be used by the government vehicles. **K, L,** and **M***

[70] *Ibid.*, pp. 421-423, [Italics in the original]. See more extensive exposition of the debate from both legal and economic perspective in Esty, D., Greening the GATT – Trade, Environment, and the Future, (Institute for International Economics, Washington DC: USA, 1994) (Chapter 1); Schoenbaum, T. J., *Free International Trade and Protection of the Environment: Irreconcilable Conflict?,* AJIL Vol. 86, No. 4 (Oct., 1992), pp. 700-727, available at www.jstor.org/stable/2203789 (last accessed: 24/079/2010).; Shaffer, G., *WTO Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labour, Trade-Environment Linkages for the WTO's Future,* in The Future of the World Trade Organization, Fordham International Law Journal 608-651 (Nov.-Dec. 2000), pp. 3 – 13, and Bodansky, D., *What's So Bad about Unilateral Action to Protect the Environment?* EJIL 2000 11 (339)2

[71] The economics dimension of this problem relates inter alia to the question of the competitiveness effects of adopting a unilateral environmental measure to protect the environment? On this question, See Aldy, J. E., and Pizer, W. A., *The Competitiveness Impacts of Climate Change Mitigation Policies*, (Resources for the Future Prepared for the Pew Centre on Global Climate Change, 2009).

*supply companies won 98% of the contracts living only 2% to **X, Y, Z, D** and **E** companies. The winners however, happen to be all from **A** domestic industry. They have the advantage of being generally more prepared (in terms of their technical ability), but also because, being subjects of **A**, they have made special provisions in their production processes and operations to comply with **A's** climate change-related demands. **X, Y, Z, D** and **E** are foreign but locally-based supply companies doing business in **A**. They feel aggrieved as the government policy affected them adversely disproportionately. They also see their products did not meet the tender specification not because they are not good enough, but more because of their PPMs.They would seek redress under the WTO dispute settelement system.*[72]

The maze above depicts a case of de-facto discrimination likely occuruing in GPP process. The possible issues that arise here include:

a) **X, Y, Z, D** and **E**, can jointly or individually institute, through their home countries a complaint to the WTO DSB under the GPA Art. III on non-discrimination, against **A**, for de-facto discrimination and based on NPR PPMs. **A** may have a defence under GPA Art. XXIII exceptions.

b) Assuming **A** is EU, and **X, Y, Z** are nationals of Member Countries of EU, they cannot complain, because the EU Common Market has instituted GPP targeted at climate mitigation.

c) Assuming also **A** relies on its Kyoto commitments, but **D** is not even a Party to the Kyoto or any climate regime, can **A** still have a defence under GPA Art. XXIII exceptions?

d) Where **E** is from a developing coun**t**ry, but *not* party to GPA even though a signatory to the Kyoto, can a complaint on E's behalf be sustained?

[72] This hypotheitical is an example of the practical issues essentially addressed by the thesis. Analyis on how a WTO dispute settlement panel may handle such issues are found mainly in chapters 6 and 7. However, the conclusion of the thesis leads to an amendment proposal to the WTO GPA which may pre-empt the occurrence of the complicts depicted here. The proposal is at the end of analysis in chapter 7.

A similarly relevant question, in the trade-environment interaction, but which is usually over-looked in the discourse, is as to the nature of the particular environmental problem at issue: local, transboundary or global and to what extent does this matter? A trade restrictive measure required to address a "local" or even "transboundary" pollution may not be as justifiable as that required, for instance, to address an environmental problem of global nature like climate change. This view seems to be endorsed by Bhagwati when he said, in order to analyse "with clarity" and to "design optimal policy solution" to the issues of linkage of trade and environment, one of the crucial questions is whether the environmental damage or pollution is "'domestic' or 'international'."[73]

2.2.2 Trade and the environment interaction: a brief historical perspective

2.2.2.1 Environmental issues in the GATT

Among the prolific and vocal commentators on this debate were Daniel Esty,[74] Steve Charnovitz[75] Gregory Shaffer,[76] Robert Howse (with Donald Regan)[77] and Jagdish Bhagwati.[78] Shaffer[79] for instance, states that when the original GATT was drafted in 1947, environmental protection was not contemplated. This is because the environment as it is known today was neither on the agenda of the institutions of

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[73] See Bhagwati, J., *On thinking clearly about the linkage between Trade and the Environment*, in The Wind of the Hundred Days –How Washington Mismanaged Globalization, (The MIT Press, 2002), p. 191.

[74] See Esty, D. C., *supra,* n. 70, p. 49.

[75] For instance, Charnovitz, S., *Exploring the Environmental Exceptions in GATT Art. XX,* J. World Trade 37 (Oct. 1991) (hereinafter, "Charnovitz, *Exploring the environmental exceptions"),* available at www.geocities.com/charnovitz/JWT.htm; Charnovitz, S. *GATT and the environment: Examining the issues,* International Environmental Affairs 4 (3), 1992, 203-33. See also Charnovitz, S., *The WTO'S Environmental Progress,* JIEL Vol. 027 (2007) 1–22 at p. 3.

[76] See for instance, the extensive article by Shaffer, *Blue-Green Blues, supra,* n. 70.

[77] See generally, Howse, R. and Regan, D. H., *The Product/Process Distinction -An Illusory Basis for Disciplining "Unilateralism" in Trade Policy* (EJIL, 2000 pp. 249-289). See also *infra,*, Section 2.2.3.

[78] See Bhagwati, J., *Afterword: the Question of Linkage,* in Alvarez, J. E (ed.), *The Boundaries of the WTO, supra,* n. 59.

[79] Shaffer, G., *The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 Harvard Environmental Law Review 1-93 (Winter 2001). Published also as Shaffer, C. G., *If Only We Were Elephants: The Political Economy of the WTO's Treatment of Trade and Environment Matters* in The Political Economy of International Trade Law: Essays in Honour of Robert Hudec, (Kennedy and Southwick Eds., 2002).

global governance nor in the domestic policies of any country. Thus, interest in the environment was "largely non-existent"[80] or "not a major concern".[81] The focus at that time was on economic reconstruction following the destruction meted by the World War II, and to avoid depression similar to what followed the World War I.[82] There were therefore no provisions in the GATT 1947 that clearly addressed environmental protection and sustainable development.[83] Thus, even the provisions of Art. XX(b) and (g) of the GATT[84] which sought to permit inter alia "measures... necessary to protect human, animal or plant life or health," and those "relating to the conservation of exhaustible natural resources," respectively, arguably were not referring to environmental protection as it was known in 1994 when the GATT was up-graded to WTO.[85] Indeed some commentators argue that the exact intendment of the negotiators on those provisions were not clear enough.[86]

On the other hand, however, Charnovitz drew attention to the fact that it was not entirely correct to suggest that there was no environment foot-print in the original

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[80] See Jackson, J. H., Davey, W. J. and Sykes, A. O., The Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations, (Third Edition) (West Publishing Company, 1995), 561, (Hereinafter, "Jackson, *The Legal Problems"*).

[81] *Ibid.* p. 559

[82] See Weiss, E. B., *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 Am. J. Int'l L. 728-735, (1992), 728. Edith noted that at the date of the Article (two decades after establishment of UNEP) environment and sustainable development had become so much on the global arena that there were "almost 900 international legal instruments that were either fully devoted to environmental issues or had one or more significant provisions directed to environmental protection". See p. 729.

[83] See *Ibid.*, 728.

[84] For the text of GATT Art. XX(b) and (g) and their GPA version see Chapter 7, Section. See also Appendix I Part III *[Selected Provisions From The General Agreement On Tariffs And Trade]*.

[85] See Mattoo, A. and Subramanian, A., *Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution,* JIEL 1(1998)303 -322. Throughout the paper, the authors kept referring GATT Art. XX, as not covering the "environment." See for instance, pp. 307-308.

[86] *Ibid,.* The earliest cases under the GATT that addressed environmental concerns appeared only in the 1990s. See however, Charnovitz, S., *supra,* n. 75. See also *Trade and the Environment – A Report Prepared by the GATT Secretariat (1992),* in Jackson, J. H. (et al), *The Legal Problems, supra,* n. 80, p. 651. This report suggests that trade-environment interaction "dates back at least to the trade provisions in the 1933 convention on fauna and flora").

GATT.[87] He traced the history of environmental provisions in international trade and commerce agreements to the *1927 International Convention for the Abolition of Import and Export Prohibitions and Restrictions,*[88] the world's first round of trade negotiations. This Convention sought to abolish all kinds of trade restrictions. The Convention however, inserted exceptions for trade restrictive measure maintained for *"protection of public health or for protection of animals or plants against disease, insects and harmful parasites."*[89] After heated debate by the Parties to the Convention on the import of these exceptions, an addendum had to be inserted in the Treaty's Protocol which clarified that the "protection of animals or plants against disease," would include "measures taken to preserve them from degeneration or extinction".[90] Charnovitz then concluded inter alia that because of the inter-relationship of "sanitary, veterinary, psychopathological and nature preservation, their objectives were encompassed under the same exception."[91]

To Esty, in order to address environmental concerns in a multilateral manner in the same fashion as the WTO in the case of trade issues, there would be the need, inter alia, for the creation of a global environmental organisation (GEO), in the format of the International Labour Organisation (ILO) to exist side by side with the WTO.[92] The GEO would serve as a more viable forum to address even the competitiveness concerns and the cost internalization for environmental externalities.[93] Absent that, Esty opined the next alternative would be review of the GATT or in particular Art.

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[87] See Charnovitz, S., *supra,* n. 75.

[88] The Convention was signed at Geneva, November 8, 1927, League of Nations Doc. 557, M201, 1927.IIB. See also The American Journal of International Law, Vol. 25, No. 3, Supplement: Official Documents (Jul., 1931), pp. 121-145 (American Society of International Law) available at: http://www.jstor.org/stable/2213116 (last accessed: 09/07/10).

[89] *Ibid.*, Art. 4:4

[90] Charnovitz, S., *supra,* n. 75.

[91] Ibid.

[92] See Esty, *supra,* n. 70, pp. 4-5

[93] *Ibid.*

XX, to take into cognisance the concerns of the environmentalists.[94] The review suggested of Art. XX will target the word "necessary", to be replaced with some other term or phrase which will soften the grip on the ability of WTO Members to exercise their right to institute domestic policies of their choice to protect the environment with less apprehension of litigation.[95] In all circumstances, Esty suggests, due regard should be given to the nature of the environmental concern being addressed. It is the level and magnitude of the harm or threat posed by an environmental challenge that gives legitimacy to the policy or measure imposed or proposed.[96]

The lack of certainty as to the positioning of the environment in the overall scheme of the GATT was clearly exhibited, in 1991, by the Panel rulings in the *US-Tuna/Dolphin I and II* disputes[97]. It was decided in these disputes that the US

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[94] *Ibid.*

[95] *Ibid.,* pp. 221 – 222. This suggestion emanated from an earlier summary paper by Austria on the EMIT (see EMIT *infra,* Section 2.2.2.2).

[96] Esty, D., *supra*, n. 70, pp. 120-127. Indeed, in this regard Esty suggested to issue to be assessed by considering:

- "The importance of the environmental resource affected
- The strength of the scientific assessment of inquiry
- The speed at which the harm is occurring (i.e., the urgency of the situation)
- Irreversibility of the potential damage, and The breadth of the threatened harm."

[97] In the *US - Tuna/Dolphin I* dispute, in 1990, some US environmental groups obtained a court injunction forcing the US government to place a ban on imports of Mexican tuna. The ban was predicated upon the *Marine Mammal Protection Act of 1972 (16 U.S.C. 1412),* a US legislation which inter alia provided for a programme aimed at protecting dolphins usually trapped in Mexican fishing nets. Mexico filed a complaint before the GATT. The MMPA also set standards for fishing fleets for domestic fishing industry, applicable also on fishermen from countries that exported fish to the US. Thus, countries exporting tuna to the US must prove to US trade inspectors that the fishing method they used complied with the US-set standards, before their tuna would cross the border into the US. The Panel found that the US ban violated Art. XI of GATT that prohibits "quantitative restrictions". The reasoning of the ruling was that the ban targeted the "process of producing tuna," and not the quality of the tuna itself. Secondly, the US ban amounted to a unilateral imposition of US domestic standards on foreign countries (otherwise referred to as "extra-territoriality") which the Panel thought was not warranted by GATT Art. XX. This ruling disregarded the fact that the ban sought to protect the living natural resources (dulphins), thus disallowed recourse to the, the environmental exceptions, to save the US's measure.

In the *US – Tuna/Dolphin II,* the US embargo (in the *US – Tuna/Dolphin I* case) affected both "primary" and "intermediary nations" (including EC and The Netherlands). Thus these intermediary nations filed a complaint against the US. The Panel found that neither the primary nor the intermediary nation embargo were covered under Article III as claimed by the US, and that the embargo as it affected both categories of nations was contrary to Article XI:1 and not justified by the exceptions in GATT Article XX (b), (g) or (d). The Panel also rejected the territorial limitation of the application of Art. XX as in the first case, and,

unilateral "process-based"[98] measure restricting the import and sale of tuna caught by non-dolphin friendly methods run counter to Art. XI, and not be justified under the Art. XX(b) and (g) exceptions. The main contention in these disputes surrounds the GATT-illegality of unilateral use of process-based trade measures to promote environmental protection.[99] The Panel even suggested that if the GATT had wished to permit such trade-restrictive measures on the basis of environmental protection then there would have been more rules developed to that effect.[100] This ruling attracted wide media attention, as it sparked up heated criticism from especially international environmental NGOs. They believed this lack of clarity led to the relegation of environmental concerns to the background, as exemplified by that ruling.[101]

As this Panel deliberated while the Uruguay Round negotiations were still going on, the negotiators were able to insert in the Preamble to the WTO agreement establishing the WTO, a brief mention of the "objective of sustainable development'

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instead suggested that Article XX (b) and (g) could not apply to measures where such (measures) would only be effective in protecting the environment if other countries would change their policies in compliance. This aspect of the ruling disregarded the fact that reduction of imports of dolphin-unfriendly tuna and fewer dolphins being killed. Thus change of policy was not necessary to achieve some environmental benefits from the measure. For in-depth reviews on these disputes at See WTO, *Mexico, etc versus US: 'Tuna-Dolphin'* at: http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (last visited: 01/05/10); Parker, R., *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict,* 12 GEO. INT'L ENVTL. L. REV. 1 (Fall 1999); Trachtmann, J., Decision: GATT Dispute Settlement, 86 AM. J. INT'L. L. 142 (1992); Howse, R., *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate,* 27 Colum. J. Envtl. L. 2002, 49*1*available at http://www.worldtradelaw.net/articles/howseshrimp.pdf (last visited: 17/07/10).

[98] On the distinction between "product" and "process-based" measures, see *infra,* Chapter 6 Section 6.4.

[99] Cheyne, I., *Trade and the Environment: the Future of Extraterritorial Unilateral Measures after the Shrimp Appellate Body,* [2000] 5 Web JCLI: http://webjcli.ncl.ac.uk/2000/issue5/cheyne5.html (accessed last 06/09/09). See also, for example, Esty, D. C., *Supra,* n. 70. Sands, P., *'Unilateralism', Values, and International Law,* 11 EJIL 291 (2000); Schoenbaum, T.J., *International Trade and the Protection of the Environment: The Continuing Search for Reconciliation,* 91 *AJIL* 268, 1997).

[100] *Ibid.*. para. 6.3.

[101] See Santarius, T., et al, *Balancing Trade and Environment: an ecological reform in the WTO as a Challenge in sustainable Global Governance –What Kind of globalisation is sustainable?* (Wuppertal Institute for Climate, Environment, Energy, Wuppertal, Germany, 2004), pp. 8-12. In the case of North America, another triggering facto was the signing of the NAFTA, which many environmental groups feared would allow trade objectives enunciated in that agreement (because of the involvement of Mexico, a developing country) to undermine environmental standards. See Esty, D. C., *supra,*, n. 70, pp. 27-32, and Shaffer, G., *WTO under Challenge, supra,* n. 79*,* at 26.

and "protection of the environment," as part of the objectives of the multilateral trading system.[102] Of course, to the environmentalists, and many trade law commentators, this was a monumental positive breakthrough in the history of the interactions of the trade and environmental policies, and the first of its kind.[103]

As there were still no substantive provisions in the GATT on environmental protection the Preamble to the WTO Agreement had to be *strengthened* using teleological and evolutionary methods of interpretation by the WTO AB in the *US-Shrimp* ruling.[104] The AB in that ruling stated that the words in GATT Art. XX, which were "crafted more than 50 years ago ... [are] by definition, evolutionary... [and]

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[102] See the Preamble to the *Agreement Establishing the World Trade Organization* at: <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf>. See also Picciotto, S., *supra,* n. 31, pp. 10-11, footnote. 23.

[103] See for example, Staffin, E. B., *Barrier or Trade Boon - A Critical Evaluation of Environmental Labelling and Its Role in the Greening of World trade,* 1996 Columbia Journal of Environmental Law, Vol. 21: 205, footnote 1 (HeinOnline). See also Berber, J. R., *Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle's Case,* p. 1, Columbia Journal of Environmental Law, vol. 24, 1999, *Page 355*..

[104] *US – Shrimp (ABR),* paras. 129-131. The facts of this are similar to those of the *US – Tuna/Dolphin.* This was a joint complaint by India, Malaysia, Pakistan and Thailand, against the unilateral imposition of import prohibitions by the U.S. on the importation of certain shrimp and shrimp products pursuant to its legislation [Section 609 of Public Law 101-162 (hereinafter, "Section 609") and associated regulations and judicial decisions]. This law aimed to prohibit importation into the U.S. of shrimp harvested with fishing technology that adversely affects sea turtles. The law exempted certain countries from the prohibition. There was also a provision for grant of permits certification for any exporting state that adopts a regulatory programme for the incidental taking of sea turtles where it is comparable to that of the U.S. The US's fishing technology required the use of "turtle excluder devices" (TEDs). At Panel level, the US measure was found to contravene GATT Art. XI, and it was not saved by GATT Art. XX (g) exceptions. The measure was not considered under Art. III, As the measure was found inconsistent with the *chapeau* of Art. XX, the Panel ruled that it needed not to address Art. XX(b) or (g). The Panel based its decision on the fact that the measure was unilateral one, and thus not justifiable under the exceptions under GATT Art. XX as it would "undermine the multilateral trading system." (See Panel Report, para. 7.60).

The AB rejected the Panel's reasoning and but still reached the same ruling based on other grounds. The AB held the U.S. measure did qualify for provisional justification under paragraph (g) of Art. XX but does not comply with the *chapeau.* The AB re-established the logic of examining the *essence* of a measure first against the paragraphs of Art. XX before proceeding to look at the *manner of the application* the measure against the *chapeau.* The AB's finding of discrimination contrary to the *chapeau* was based on essentially two grounds: (1) the US's failure to establish or follow due process procedure in manner Section 609 was implemented, and (2) although the law itself provided for the establishment of negotiations process with countries that could be affected by the operation of the law, the US did not engage in such negotiations, or engaged with some and disregarded other countries. Thus, while the AB "did not explicitly accept that a multilateral environmental agreement would be a sound basis for an exception under art. XX, it welcomed environmental measures, and recommended those that are not unilateral." The AB also adopted the so-called evolutionary approach to deviate from and interpretation based on the concept of "original intent" of the GATT art. XX(g), now favouring "a more dynamic" approach that takes into account current circumstances. See also Trachtman, J. P., *Introduction to the Shrimp-Turtle Case, Brief Summary and Analysis of the WTO* Panel *and Appellate Body Decisions*, at: http://www.iilj.org/courses/documents/Shrimp-Turtlecase.pdf (last accessed: 17/07/10).

must be read... in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[105] This was the first high level judicial interpretation of the said provisions of the GATT. It came in 1998, that is, only after the establishment of the WTO. It was the "boldest attempt" so far to strike a balance between trade liberalisation and environmental protection under the WTO system.[106] However, it should be noted, going by the VCLT Art. 31(2), that preambular provision is only part of the "context" for the purpose of interpretation of the text of a treaty. It should not serve as authority for an interpreter to insert extraneous material into the treaty text.[107] Thus, Kelly,[108] among others, stated that the interpretation of paragraph (g) above, using the so-called evolutionary approach to include non-living exhaustible natural resources was far-fetched. [109]

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[105] See more commentary on this in Charnovitz, S., *The WTO'S Environmental Progress, supra*, 75, p. 3.

[106] Benjamin, S., *In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report: Note,* vol. 24, 1999, Page 414 *(H*einonline) available at: http://www.heinonline.org/HOL/Page?handle=hein.journals/cjel24&id=1&size=2&collection=journals&index=journals/cjel accessed (24/10/08). See also Mills, R., *U.S. Wins WTO Case on Sea Turtle Conservation (10/22/2001) Ruling Re-affirms WTO Recognition of Environmental Concerns,* Office of the United States Trade Representative (USTR) at: http://www.ustr.gov/Document_Library/Press_Releases/2001/October/US_Wins_WTO_Case_on_Sea_Turtle_Conservation.html (accessed 14/09/08).

[107] See Picciotto, S., *supra,* n. 31, pp. 10-11, footnote. 23. See also: *Access to the Port of Danzig.* 1931 P.C.I.J., Scr. A/B, No. 43, p. 144: *"The Court is not prepared to accept the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in be text itself."* See generally, Jacobs, F. G., *Varieties Of Approach To Treaty Interpretation: With Special Reference To The Draft Convention On The Law Of Treaties Before The Vienna Diplomatic Conference*, 18 ICLQ 1969(318-346). One recalls here, Thomas Walde's criticisms of the legal drafting practice where drafters introduce concepts that seem not intended by the negotiators of the treaties: "Or do we have a case of preambular overshoot, i.e. the production of high-sounding and far-reaching preambular references to all sorts of currently prevailing concepts and attitudes (economic liberalism; human rights; environment; indigenous people and whatever is politically correct in treaty-making and its surrounding public opinion), which neither the negotiators/drafters nor the signing governments nor the ratifying legislatures really wanted to be taken that seriously?" See Waelde, T., *Sustainable development and the 1994 Energy Charter Treaty: between pseudo-action and the management of environmental investment risk*, in: Weiss, F., et.al. (Eds.), International Economic Law with a Human Face, Kluwer Law, London 1998, 223-271. See also Members' contributions on OGEMID *(Oil-Gas-Energy-Mining and Infra,structure investment)* Electronic Discussion Forum [http://www.transnational-dispute-management.com/ogemid/] discussions on the subject of *Legal effect of preambles in treaty interpretation,* 19th -30th April 2007.

[108] Kelly, J. P., *The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance,* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106895 (last accessed 30/09/09), p. 459. See also Taira, *supra,* n. 69.

[109] *Ibid.,* pp. 468-469. Of course, *s*ome other commentators commended this adoption of evolutionary approach by AB. See for instance, Trachtman, J. P., *Introduction to the Shrimp-Turtle Case, supra,* n. 104.

Bhagwati's treatises generally indicate an apparent dissatisfaction with the current state of the WTO system as it relates to the linkages issue. His own perspective is more developing-country centred. He supported the *US - Dolphin I and II* rulings, and went to the extent of insinuating that the "environmentally more accommodating interpretation of the scope of Article XX" in the AB ruling in the *US – Shrimp* might have well been influenced by strong environmental interests represented by the North-based NGOs.[110] These were the NGOs, he opined, bent on undermining free-trade, and with adverse consequences on the developing countries' market access.[111] He said the term "sustainable development" used in the Preamble to the WTO agreement was not known even by God himself,[112] but was constantly pushed onto developing countries. He then suggested inter alia that reform would be required in the WTO jurisprudence, so that the *US – Dolphin* position is re-affirmed, or if environmental measures are fully accommodated, then there should be some in-built mechanism that would minimise their impacts on the developing countries.

2.2.2.2 The UNCHE, the GATT Secretariat and the EMIT Working Group

The AB ruling in the *US – Shrimp* case was certainly informed by developments then in the global arena marked by growing awareness and "concern about the impact of economic growth on social development and the environment".[113] These developments became more manifest in the 1970s when international response started building up through the UN system[114] with the 1972 UN Conference on

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[110] See Bhagwati, J., *supra,* n. 78, p. 133. This view was shared and strongly re-echoed by Kelly where he emphasized inter alia, that the AB ruling in *US – Shrimp,* which allowed the environmental PPMs to block developing countries' exports to developed world had effectively undermined their (developing countries') development contrary to the objectives of the WTO.… See generally, Kelly, J. P., *supra,* n. 108, p.1.

[111] See *Ibid.*, generally.

[112] *Ibid*., p. 133. Bhagwati then opined that in the spirit of fairness, the AB ruling in *US – Shrimp* should have affirmed the earlier *US – Tuna Dolphin* rulings, and then leave the trade-environment contentious issues to be decided politically through the renegotiation of the GATT Art. XX(b) and (g).

[113] WTO, *Environment: Early years: emerging environment debate in GATT/WTO,* at http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm#EMIT (accessed 17/08/09).

[114] Shaffer, G., *WTO Under Challenge*, *supra,* n. 79, p. 22.

Human Environment (UNCHE) on how best to manage the relationship between development and human environment.

As preparatory to the UNHCE the GATT Secretariat submitted a contribution in a study entitled *Industrial Pollution Control and International Trade.*[115] The study focused on "the implications of environmental protection policies on international trade."[116] The paper sought to explore the extent to which the then 78 GATT contracting parties were "free to act in this (stated) area consistently with the obligations they have assumed with respect to promotion of international trade on a non-discriminatory basis."[117] In order to look into the issue further the GATT Contracting Parties formed the Working Group on Environmental Measures and International Trade (EMIT Working Group)[118] in 1971. This Group was assigned to examine, "upon request any specific matters relevant to the trade policy aspects of measures to control pollution and protect human environment, especially with regard to the application of the provisions of the General Agreement."[119]

The EMIT participation then became necessary in view of the growing concern that some MEAs earlier concluded had contained specific trade measures. These measures though aimed at facilitating achievement of the objectives of those MEAs, raised issues with the provisions of GATT. Such MEAs include the Montreal

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[115] *GATT L/3538, 9 June 1971*, available at: http://gatt.stanford.edu/bin/search/simple/process?offset=0&length=10&query=Industrial+Pollution+Control+and+International+Trade&search=Search (last accessed 17/07/10).

[116] WTO, *Early years: emerging environment debate in GATT/WTO*, at http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm (last accessed 07/07/10). See also *Trade and Environment: Factual Note by the Secretariat,* (L/6896 18 September 1991).

[117] See *GATT L/3538, 9 June 1971, supra,* n. 115, p. 3. See also *Trade and Environment Factual Note by the Secretariat,* (L/6896 18 September 1991).

[118] Hereinafter referred to as "EMIT".

[119] See GATT Council, Minutes of Meeting Held in Geneva, on 9 November 1971, C/M/74 at 4 (Nov. 17, 1971) (containing the decision of the GATT contracting parties to establish a group on environmental measures and international trade).

Protocol[120] which has been submitted as having inspired much of the structure of the UNFCCC and Kyoto Protocol but for the "stick" it uses in the form of trade measures to entice non-parties into compliance.[121] Other such MEAs are the CITES,[122] the CBD, especially through the Bio-safety Protocol,[123] the Rotterdam Convention,[124] Stockholm Convention[125] and the Basel Convention.[126]

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[120] *The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol to the* Vienna Convention for the Protection of the Ozone Layer which was adopted on 22 March 1985*),* (as either adjusted and/or amended in London 1990 Copenhagen 1992, Vienna 1995 Montreal 1997 Beijing 1999), available at: http://www.unep.org/OZONE/pdfs/Montreal-Protocol2000.pdf (accessed 08/09/08). The Montreal Protocol' objectives as provided for under Arts. 2 and 5, includes the protect ion of the stratospheric ozone layer, and thus human health and the environment, by equitably controlling the production and consumption of substances that deplete it, with the ultimate objective of their elimination. Trade-related measures in this Protocol are found inter alia under Art. 4, which prohibits, with respect to controlled substances, the import and export to non-Parties. It also establishes a process for Parties to limit the international movement of products containing the controlled substances or produced with the controlled substances

[121] Garnak, A., *May the Second Best Win: Another Look at the Lessons for Climate Change Mitigation from the Montreal Protocol"* MEA Bulletin (A newsletter on the activities of key multilateral environmental agreements (MEAs) and their secretariats), Issue No. 57, 7 November 2008, International Institute for Sustainable Development (IISD), pp. 1-2.

[122] *The Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) Signed at Washington, D.C., on 3 March 1973, and [entered in force on 1 July 1975] The *Convention* aims at ensuring that international trade in of wild animals and plants does not threaten their survival. It recognizes the need to complement conservation efforts with support for responsible trade in wildlife, available at: http://www.cites.org/eng/disc/what.shtml (accessed 08/09/08). Trade-related measures in this Convention include provisions under Art. II for a permitting system for international trade in listed species, requirements for trade with non-Parties, and measures for cases of noncompliance. Other trade-related provisions are found in Arts. IV, V, VI, VII and VIII with their accompanying Appendices.

[123] *The Convention on Biological Diversity (CBD*) was adopted at the UNCED. It came into force at the end of 1993. The Convention establishes three main goals: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources. The CBD is available at: www.cbd.int/convention (accessed 08/09/08). On 29 January 2000, the Conference of the Parties to the CBD adopted the Cartagena Protocol on Bio-safety, as supplementary to the Convention. The Protocol seeks to protect biological diversity from the potential risks posed by living modified organisms (LMOs) resulting from modern biotechnology. Although the Protocol contains a broader overall objective, which primarily focuses on transboundary movements of LMOs, the provision related to trade, are mostly found in the measures within the advance informed agreement (AIA) procedure. These refer to trade with non-Parties and to the handling, transport, identification and packaging of LMOs.

[124] *The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* was adopted on 10 September 1998 by a Conference of Plenipotentiaries in Rotterdam, the Netherlands. The Convention entered into force on 24 February 2004. The objectives of the Convention are: (1) to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm, and (2) to contribute to the environmentally sound use of those hazardous chemicals, by facilitating information exchange about their characteristics, by providing for a national decision-making process on their import and export and by disseminating these decisions to Parties. It is available at: http://www.pic.int/home.php?type=t&id=49&sid=16 (accessed 08/09/08).

[125] *The Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention)* was signed on May 23rd 2001 in Stockholm, Sweden. The convention entered into force on May 17th, 2004 with ratification by an initial 128 parties and 151 signatories. The convention aims to take global action on POPs, defined as "chemical substances that persist in the environment, bio-accumulate through the food web, and pose a risk of causing adverse effects to human health and the environment".

The main justification for including trade-related measures in the MEAs is that these measures play "an important role in supporting other MEA provisions … and ensuring [their] effectiveness".[127] Such measures aim at "assisting in compliance and enforcement"[128] of the provisions of the MEAs and the implementation of their purport. Thomas J. Schoenbaum analyses four situations characterising the trade and environment interactions in which environment related measures give rise to trade restrictions. These are (1) regulation of imports and exports to protect the domestic environment; (2) trade restrictions to enforce environmental standards in international agreements, (3) trade restrictions in response to perceived inadequate environmental protection controls in other countries; and (4) controls on the export of hazardous products, technologies and wastes.[129]

It could be added that as in the case of MEAs that address trans-boundary environmental challenges of a global nature, another objective of inserting trade related measures is to force compliance by non-parties or at best to prevent or minimise free-riding. An example of such MEA is the Montreal Protocol on Substances that Deplete the Ozone Layer, which under Art. 4, for instance,

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[126] *The Basel Convention on the Control of Trans-boundary Movement of Hazardous Wastes and their Disposal (Basel Convention)* came into force in 1992. It is aimed fundamentally at the control and reduction of transboundary movements of hazardous wastes and other wastes subject to its provisions. This includes the disposal and treatment of such wastes as close as possible to their source of generation, the reduction and minimization of their generation, the environmentally sound management of such wastes and the active promotion of the transfer and use of cleaner technologies.

[127] See generally, UNEP, *Trade-related Measures and Multilateral Environmental Agreements,* Economics and Trade Branch Division of Technology, Industry and Economics United Nations Environment Programme, 2007), pp 9-10. For more graphic listing and analysis of the trade-related measures contained in 14 MEAs, see the WTO 2000 study which has been up-dated several times, with current version being the 2007 revision: WTO, "*Matrix On Trade Measures Pursuant To Selected Multilateral Environmental Agreements,"(2007 Revision)* WT/CTE/W/160/Rev.4 TN/TE/S/5/Rev.2, 14 March 2007, available at: http://www.jmcti.org/2000round/com/doha/tn/te/tn_te_s_005_rev2.pdf (accessed 08/09/08).

[128] *Ibid.*

[129] *Ibid.*. See Schoenbaum, T. J., *supra,* n. 70, p. 731. Hudec also cited two motivations for import-related enviromental measures that may give raise to discrimination concerns: these measures that seek to "level the playing field" and those directed to influence a change in the foreign government's behavior. These measure may run counter to the MFN obligations of the WTO Member maintaining them. See Hudec, R. E., *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in Bhagwati, J. and Hudec, R. E.. (eds.), Fair Trade and Harmonization (MIT Press, 1996), 95 at 96.

prohibits, with respect to controlled substances, the import and export to non-Parties. This is clearly contrary to Art. XI of the GATT prohibiting quantitative restrictions.

2.2.2.3 The Committee on Trade and Environment (CTE)

The EMIT was for all practical purposes a dormant, ineffective body. Since its establishment in 19971 the group was said to have never met until 1991 when the GATT Council was considering a proposal submitted by the European Free Trade Area (EFTA) to convene the EMIT meeting.[130] This meeting first muted the idea of the desirability of creating a committeed to oversee trade-environment interactions in the GATT. This lead to creation in 1994 of the CTE pursuant to the *1994 Uruguay Round Ministerial Decision on Trade and Environment*,[131] the CTE was tasked with the responsibility to identify the relationship between *trade measures* and environmental measures in order to promote sustainable development.[132] The CTE then was to make recommendations to the *WTO* on whether changes in the provisions of the various *Uruguay Round agreements* were needed in light of such relationship. The *Doha Ministerial Declaration* (DMD) thereafter mandated the CTE to conduct negotiations, through *special sessions*, on various trade and environment-related issues under *Paragraph 31(i), (ii), and (iii)* of the DMD. Membership in the committee was open to representatives of all WTO Members.[133]

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[130] The EMIT met for the first time in 1991 at the request of the members of the European Free Trade Association. See WTO, *supra,* n. 113. See also Charnovitz, S., *supra,* n. 75, at p.37.

[131] See WTO, *Decision on Trade and Environment supra,* n. 19. In setting the TOR of the CTE, this Decision referred inter alia to both the *Rio Declaration on Environment and Development* and *Agenda 21*. Of particular relevance is Principle 12 of the Rio Declaration, which states, in part:

> Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. *Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus.*(emphasis added)

[132] See also WTO and UNEP joint report, *Trade and Climate Change* (WTO, Geneva, 2009), p. 142.

[133] *Ibid.*

Consequently, the subject of climate-friendly procurement policies in so far as it brings into focus the interrelationship between environmental measures and trade policies, falls within the ambit of the CTE's responsibility. The forum can be utilised to discuss how GP measures could support climate change mitigation, so that conflicts between the GPA and UNFCCC/KP are avoided. Regrettably however, the CTE deliberations, so far, whether in the Special Sessions or under the Doha negotiations agenda, have not yielded much results on the issues. And the Doha process, in which much hope is placed, has been moving on rather too slowly.

2.2.2.4 The trade-environment jurisprudence after the creation of the WTO

As noted earlier, it took the creation of the WTO to see clearer progress in the trade-environment interactions. On the authority of both *US – Gasoline* and *US – Shrimp* rulings the WTO asserts now that "while there is no specific agreement dealing with the environment under WTO rules, members can adopt trade-related measures aimed at protecting the environment provided a number of conditions to avoid the misuse of such measures for protectionist ends are fulfilled."[134] Specifically, the AB in *US – Gasoline,* which incidentally was also the first ever WTO dispute, accepted the finding by the Panel *inter alia* that "clean air" is an exhaustible natural resource within the meaning of the GATT Art. XX(g).[135]

However, a bolder position was arrived at with the 2007 AB ruling, in the *Brazil – Tyres* ruling. To many commentators, WTO is turning through this ruling as potentially more environment-friendly.[136] What *Brazil – Tyres* has done essentially is

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[134] WTO, *Trade and environment,* available at <http://www.wto.org/english/tratop_E/envir_e/envir_e.htm> (last visited 10/06/10). The Panel report, circulated in 1991, was not adopted. So it does not have the status of a legal interpretation of GATT law. The WTO re-assures thus: "*The WTO contributes to protection and preservation of the environment through its objective of trade openness, through its rules and enforcement mechanism, through work in different WTO bodies, and through ongoing efforts under the Doha Development Agenda. The Doha Agenda includes specific negotiations on trade and environment and some tasks assigned to the regular Trade and Environment Committee."*

[135] See *US – Gasoline (ABR),* p. 7, referring to the Panel's findings and conclusions: para. 8.2(vi).

[136] See Julia Qin, *International Economic Law* (IEL) blog, entitled: *Brazil–Tyres: Breaking New Ground in Chapeau Interpretation*, at: http://worldtradelaw.typepad.com/ielpblog/2007/06/braziltyres-bre.html posted on June 23, 2007, (last visited 11/06/10). Julia believes that if that if Brazil would comply the ruling and

to confirm the shift in emphasis from the analysis of a measure at issue against the sub-paragraphs of GATT Art. XX, to the *chapeau*. In other words, a trade-related environmental measure is easy to fathom, but whether such a measure is justifiable against the *chapeau* is more tricky. Indeed, according to Joost Pauwelyn,[137] *Brazil – Tyres* shows that so long as the defendant strictly observes the dictate of the *chapeau* to GATT Art. XX it would matter less if the measure at issue would result in a more trade restrictive outcome.[138]

But the *chapeau* has been one hurdle that no environmental measure ever crossed, not even in the *US – Gasoline, US –Shrimp* or the *Brazil – Tyres* disputes. Thus most attention has now been focused on the satisfaction of the *chapeau* conditionalities (and not the sub-paragraphs of GATT XX) in the analysis of environmental measures in trade regulation. This then raises the question whether environmental measures would ever cross this *chapeau* hurdle? And to what extent would this *chapeau* constrain climate-motivated measures which have been accepted as not only desirable but urgent.[139].

2.2.3 GPP, climate change and trade interaction

While there is abundant literature on the general subject of public procurement, the treatment of public procurement in the context of the WTO law and policy seems to be a relatively recent development. Arrowsmith's elaborate work cited earlier,[140] which deals with the regulation of GP under the GPA generally does not specifically address the subject of the WTO regulation of "green procurement". It refers to the

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rectify its policy including extending the import ban to include MERCUSOR nations, then the decision would "have helped to promote environmental values in WTO law."

[137] See Pauwelyn, J., *Brazil - Tyres: The WTO as environmental watchdog,* International Economic Law blog at*:* http://worldtradelaw.typepad.com/ielpblog/2007/07/brazil-tyres-th.html (last accessed: 09/07/10).

[138] *Ibid.*.

[139] See further analysis of the *US – Shrimp* and *Brazil – Tyres* rulings in Chapter 7, Section 7.3.

[140] Arrowsmith, S. *supra,* n. 51. There are indeed more works being done on the general subject of public procurement by Arrowsmith and the Public Procurement Research Group (PPRG), based at Faculty of Law of the University of Nottingham, United Kingdom. See www.nottingham.ac.uk/law/pprg/publications (last visited 10/06/10).

GPA parties pursuing "secondary" policies in procurement.[141] This means using GP as a policy tool with which to support development of non-competitive domestic or infant industry and regional development.[142] Included under this category are procurement policies directed at workplace safety and environmental initiatives, even as environment is not explicitly provided for.[143] This is where the greening of procurement might feature.

The major issue of contention in this regard is the potential of GPP to constitute a "non-tariff barrier"[144]. This may arise where procuring authorities use environmental standards or criteria and eco-labelling schemes to define the characteristics of goods and services to be procured. Traditionally, standards and eco-labelling schemes have been regarded as potentially trade restrictive as they are based on processes and production methods ("PPMs"). PPMs are literally different from the actual product itself. To say, for instance, that two pieces of furniture of the same type are *different* because one is made of wood sourced from a more sustainably managed forest (PPMs), hence more acceptable in the market makes this a very controversial question in trade regulation. However, PPMs may be taken into account as part of the products or services where the PPMs affect the actual performance of the products or the quality of the services delivery. Thus where the furniture in the example above, made of a sustainably managed wood is shown to be actually stronger, hence more durable for the ordinary function and use of a

[141] *Ibid.* Chapter 13.

[142] Other objectives of secondary policies include the protection of public morals, order or safety, animal or plant life or health, intellectual property, or the products or services of handicapped persons, philanthropic institutions or prison labour.

[143] *Ibid.,* pp. 345-6.

[144] A "non- tariff barrier" is a non-tariff measure that has "a protectionist intent". See a presentation at WTO *Non Tariff Measures Data Day* at 18-19 May 2009, available at: www.wto.org/english/res_e/statis_e/data_day_may09_e/nicita_e.ppt (visited on 14/06/09). See also *infra,* Chapter 3, Section 3.1 n. 149. Not only that GPP leads to discrimination between like products/services, but also that the increased government attention in and consumption of climate-friendly procurement) may be seen as subsidy. See WTO, See generally, WTO, *World Trade Report 2005*, *infra*, n. 648; Trebilcock and Howse, *infra,* n. 213; Steenblik, R. P. *infra,* n. 213. See also See Schoenbaum, T. J., *supra,* n. 70, p. 703. For the extensive debate on the PPMs in trade law, see Conrad, C. R., *supra,* n. 28.

chair, then these processes here are called “product-related PPMs”. Such PPMs can be a reason for differentiated treatment by a procuring authority. Where the processes are not discernible in the products or the services, they are “non-product related PPMs”, and can not be used as basis for different treatments.[145]

One of the early attempts to examine this issue in some structured detail was by Buck and Verheyen.[146] They suggested that procurement programmes which take into account the direct energy performance of procured products or services are “well within the scope of technical specifications allowed under the GPA”.[147] They also warned, however, that there might be a problem with “climate change procurement programmes which refer to the non-product related climate change impacts of products and services.”[148] They proffered no particular solution to the problem raised.

The trade concerns in GPP were also highlighted by many other commentators, among them, Zhang and Assunção[149] when they warned that:

> In order to meet their Kyoto emission targets with minimum adverse effects on their economy, it is highly likely that Annex 1 governments … might pursue … policies in such a way as *to unfairly favour domestic producers over foreign ones.* Such differential treatment could occur [inter alia] in…. *the determination of the category of eco-labelled products and the procedures of establishing eco-labels,* in *the specifications in tenders*, and in *specifying condition(s) for participating in government procurement bids*. Measure(s) of this sort may well raise complex questions with respect to the WTO consistency.

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[145] PPMs question is discussed in detail in chapter 6, section 6.4.

[146] Buck, M., and Verheyen,.R., *International Trade Law and Climate Change – A Positive Way Forward,* (FES-Analyse: International Trade Law and Climate Change July, 2001), p. 17.

[147] *Ibid.*, See generally, *infra*, Chapter 6.

[148] *Ibid.,* p. 19.

[149] See Zhang, Z. and Assunção, L., *Domestic Climate Policies and the WTO,* (UNCTAD Discussion Paper series, No. 164 November 2002) pp. 12-13. [Emphasis added]

Here, the authors identified several possible scenarios whereby 'green' purchasing could violate the GPA. Among these circumstances, they cited an example of green energy procurement, where a procuring entity favours "electricity from hydro sources rather than coal-fired sources."[150] This scenario does not overtly discriminate against foreign bidders for the supply of the required type of electricity. However, the effect of the preference may be disproportionately more favourable to domestic electricity suppliers than foreign-based suppliers. This may happen because domestic suppliers would have been more prepared to comply with the specifications, on account of the Kyoto commitment of the government. This therefore may constitute a ground for complaint by the disfavoured suppliers under the non-discrimination norms of the Agreement.[151] Neither of these works has done an in-depth analyses of GPP in the context of the GPA provisions.

A similarly brief but thought-provoking treatment of the regulation of GPP under the GPA under the wider WTO system is by Van Calster.[152] This is probably the first purely academic attempt to position *green procurement* within the context of WTO and GPA. But even Van Calster concluded inter alia that the provisions of the GPA related to green procurement are far from clear. The GPA Art. XXIII on general exceptions to accommodate an otherwise WTO-inconsistent measure for environmental and other reasons (as enlisted in GATT Art. XX) does not contain the term "environment" or "natural resources conservation". Van Caster nevertheless posited that this omission notwithstanding, environmental measures could still be covered under the sub-paragraph on the protection of "human, animal and plant life

[150] *Ibid.*

[151] Brewer, T. L, *The WTO and the Kyoto Protocol: Interaction Issues, Climate Policy*, 4 (2004): 3-12, at p. 15, (Pre-publication version) available at http://www.usclimatechange.com/downloads.php/WTO-KP%2520in%2520CP.pdf (last accessed 11/10/09).

[152] Van Calster, G. *Shades of Grey, supra,* n. 39.

or health".[153] Van Calster also noted that the definition of technical specifications under the footnote to the GPA Art. VI:2 referred to PPMs but does not say whether these should be *product-related* or *non product-related.* This work also has not specifically addressed GPP in the context of climate change mitigation.

The fact however, is that, as mentioned earlier, the PPMs arguments and debates in the WTO system are far from over. This has also been attested to by Conrad in her recently concluded PhD thesis on the subject.[154] And indeed, when Howse and Regan attempted to down-play the product/process debate from the wider trade and environment context, it triggered opposition from seasoned publicists and academics including John Jackson. In one of their works on this subject, Howse and Regan[155] faulted the decision in the *US – Tuna/Dolphin disputes,*[156] on the basis that product/process distinction was illusory. John Jackson[157] however, took a different position from that taken by Howse and Regan above. He posited that product/process distinction has been part and parcel of trade law and policy, and to disregard the distinction would be unrealistic, and would open a door for abuses and result in trade restrictive measures tied to PPMs. However, while asserting the distinction as still useful, Jackson conceded that the distinction "should not be too rigid". He then posed what he regarded as "the real question", thus: "How far to relax the distinction and in what areas?"[158]

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[153] See GPA Art. XIII.

[154] Conrad, C. R., *supra,* no. 28*,* pp. 355-356.

[155] See generally Howse, R. and Regan, D. H., *supra,* n. 77.

[156] See *US-Tuna/Dolphin*, *supra,* n .97.

[157] See Jackson, H. J., *Comments on Shrimp Turtle and the Product/Process Distinction*, EJIL, 2000 Vol. 11 No. 2, 303-307.

[158] *Ibid.*, p. 303

In his comment on the papers presented at the symposium on *The Boundaries of the WTO,* Bhagwati[159] lent more weight to Jackson's caution on the need for the product/process distinction in trade law. Bhagwati drew attention to the value and justification for the distinction which informed the *US - Dolphin* Panel's conclusions. The basis of the ruling is the tradition in trade economics which seeks to pre-empt discriminatory measures through the application of "facially non-discriminatory" ones.[160] Thus, if countries are allowed "an automatic right to exclude products on PPMs grounds, especially moral grounds, that would be opening a Pandora's Box." The consequence will be weaker states would be at a disadvantage as they will be realistically too weak to resort to or invoke trade measures against the powerful nations, or as much as powerful nations could."[161] Whether the product/process distinction generally remains, the *US – Shrimp* ruling is already in place. Though the ruling did not directly address PPMs issue thereby making it, in in prinple rather insignificant, especially as ti relate to environment-related measures. This reflects the new posture of the WTO as evidenced by the WTO Agreement's preambular recognition of the environment and sustainable development.[162]

However, in his treatise on how to determine how environmental policies interact with trade rules, Bhagwati's main concerns seem to be the lack of regard paid to the nature of the environmental problems being addressed, in terms of magnitude, and the objective sought by the country that takes the unilateral measure. He opines that the scope of an environmental problem, namely, whether it is domestic or international, should constitute part of the factors to be considered in the

[159] See Bhagwati, J., *supra,* n. 78, p. 133.

[160] *Ibid.*

[161] *Ibid.*

[162] See more on this, *infra* Chapter 7, section 7.3.1.2

determination of the policy options to be designed.[163] He also warns that trade rules permitting environmental measures should take cognizance of the situation of developing countries.[164]

On the other hand, a GPP measure as described earlier is essentially origin-neutral addressing the product/process standards only, and not the origin of the products. Such measures, according to some commentators, including Robert Hudec, should not attract strict requirement of proof under the general exceptions of GATT Art. XX. This is to give the WTO Members the opportunity to distinguish between valid exercise of their sovereign right to maintain well-intentioned regulatory polices from those intended to undermine the objectives of trade liberalization.[165] We will see in Chapter 7, the effect of this reasoning to the analysis for finding a proper position for climate-motivated procurement policies under GPA Art. XXIII.

2.2.4 EU green energy procurement and the WTO

This research sought to look at the practice of green procurement in a jurisdiction that is not only a Member to the GPA, but also a committed Party to the Kyoto Protocol. For the purpose of this research, the EU has satisfied all these conditions and many more. In particular, the EU has a mature green procurement system relative to many other Kyoto Parties including Canada and Japan.[166] The essence of this illustration is to examine the real-life climate-motivated green procurement in terms of the law and the practice. This will facilitate informed analysis of the legal problems envisaged by the research, namely in the intersection of climate-motivated GPP and WTO law. The EU experiences will show how the EU dealt with the

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[163] Bhagwati, *Afterword, supra,* n. 78. See also Franck, T. M., Fairness in international law and institutions, *(New edition)* (Clarendon Press, 1998), pp. 377-379

[164] *Ibid.*

[165] See Wille, S. B., *Recapturing a Lost Opportunity: Article III:2 GATT 1994 Japan-Taxes on Alcoholic Beverages 1996*, Jean Monnet Institute working paper no. 11/97 available at: http://www.jeanmonnetprogram.org/papers/97/97-11-.html (last accessed 18/09/09). See also Hudec, R., *GATT/WTO Constraints on National Regulation: Requiem for Aims and effects Test,* 32 International Lawyer 32(1998) 619-649.

[166] For GPP initiatives of Canada, Japan a few other OECD countries see Chapter 5.

problems, and the extent to which those experiences could illustrate the situation in other countries that are also engaged in GPP. Similarly the challenges faced by the EU may serve as a guide for jurisdictions proposing to experiment GPP.

The EU permits green energy procurement pursuant to its climate change and energy policies. The permissibility of GPP in the EU law and policy is established by the new public procurement Directives.[167] Indeed, literature is developing on the EU GPP sector with most of it emanating from institutional works done under the auspices of the EU.[168] What is still debatable is the PPMs issue especially as it relates to green energy procurement.

Kunzlik's works on this aspect are rich with arguments in favour of the view that PPMs at both production and consumption stages[169] are acceptable as differentiating factors in green energy procurement.[170] He opines that the non-discrimination principles of EU law are comparable to the WTO's. Hence the environmental arguments based on the Preamble to the WTO agreement, as well as the *US – Shrimp* decision could be applicable to permit PPMs-based distinction under the EU procurement system. Accordingly, he interpreted GPA Art. VI:1 which defines *technical specifications* of products to include also "the processes and methods for their production" as meaning both product-related and non-product

[167] See *infra,* Section 6.4.1.1.

[168] See Details on the GPP Section of the EU Environment website at http://ec.europa.eu/environment/gpp/index_en.htm (last visited 17/07/10). See also EC, *Buying Green: a handbook on environmental public procurement,* (EC, 2004), available at : http://www.eprocurementscotland.com/toolkit/Graphicsfiles/Overview/Overview.htm_at_p.12 (hereinafter, "Buying Green").

[169] Consumption stage refers to the stage when the product or service is actually being put to use. In the case of green electricity, production stage refers to the stage of the "generation" of the electricity, while consumption is when the electicity is used to provide lighting, or to power or energise motorised machines, e.g., to move cars.

[170] See generally, Kunzlik, P., *International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement,* OECD Journal on Budgeting, Volume 3, No. 4 (OECD, 2003), pp. 107 – 152, particularly, at pp. 121-122 *[hereinafter* "Kunzlik, P., *International Procurement Regimes"].*

related PPMs and at both production and consumption (in the case of services) stage.[171]

In a more recent work, Trepte[172] opined that in view of the fact the EU participated actively in the architecture of the current WTO GPA and that many of its provisions are moulded in the fashion of the EU public procurement directives, there is the presumption that the EU law is (or should be) consistent with the GPA.[173] But this is not necessarily so. Indeed, Trepte's work mentions the potential of EU green energy procurement policy to raise issues with the principle of non-discrimination in view of the fact that both green electricity and the fossil-based type are as far as end-user is concerned, one and the same thing, hence there is no basis, even under the EU law, for preferential treatment for one over the other.

Another attempt to address the question of compatibility of GPP with the WTO rules in the context of EU law and practice on GP was by Van Asselt.[174] He observed that although the WTO law and jurisprudence, particularly in the context of GATT Art. XX, could well support measures taken by GPA members to protect the environment, there was still a degree of uncertainty in the manner it would treat GPP by the EU and some other GPA members concerned with climate change. The study opened up questions for research, some of which are the focus of this research too. The central question is: "What are the opportunities offered by the current WTO legal framework to accommodate a greener public procurement in

[171] *Ibid*., pp. 110-112. See also Kunzlik, P., *New procurement regimes, supra,* n. 17, at pp. 126-140.

[172] Trepte, P., Public Procurement in the EU: A Practitioner's Guide, (2nd ed.), (Oxford University Press, Inc. New York, 2007)

[173] *Ibid*. Trepte referred to the parties' obligations under EC public procurement directives as "broadly similar" but no "identical" to those of the GPA. See 131 at n. 139.

[174] Van Asselt, H., *Green government procurement and the WTO*. (Institute for Environmental Studies: 2003), (EU-sponsored "RELIEF" project).

terms of weighing environmental gains against trade principles based on Art. XXIII GPA, taking into account WTO jurisprudence?"[175]

This work also examined part of the works of the CTE related to public procurement.[176] Again, there was no specific answer or proposal by which to tackle the problem. The major recommendations of this research include that the opportunities existing in the GPA should be "examined in more detail in order to increase legal certainty."[177] It also added that there should be more dialogue between the developed and developing countries on the issue of green procurement. [178] The present research takes into account the above observations and the arguments.

In a short article[179] jointly authored by Van Asselt, van den Grijp, N., and Oosterhuis, F., however, attempt was made to more directly position GPP within the context of climate change and the WTO. This work expressly concluded thus:

> "[T]here is the risk that the use of environmental considerations in public procurement discriminates between domestic and foreign suppliers, thereby possibly conflicting with international rules on procurement. However, it still needs to be clarified under what circumstances the greening of public procurement may constitute a barrier to trade, and under what circumstances the rules on public procurement may constitute a barrier to green procurement."[180]

The authors, however, even without making analysis of the relevant WTO/GPA rules, concluded that green procurement is compatible with both the WTO and EU

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[175] *Ibid.*, Executive Summary, p.

[176] See Van Asset, H. *supra,* n. 174, at 15

[177] *Ibid.*

[178] *Ibid.,* p. 38

[179] See van Asselt, van den Grijp, N., and Oosterhuis, F., *supra,* n. 39.

[180] *Ibid.*, p. 221.

rules.[181] The basis for this conclusion is that the GPA in its current plurilateral form "has hardly any influence on climate friendly public procurement practices … because of its limited scope and coverage."[182] The present author concurs with van Asselt's conclusion, as related to the compatibility of GPP practices with the relevant EU rules. This author however disagrees with the said conclusion as relating the WTO GPA rules. Moreover, this work does not foresee climate friendly green procurement as posing even more trade barriers against developing countries that currently do not have commitments under the climate regime.

2.3 The synthesis

Generally, the literature has indicated that GPP can serve as a too with which to anchor the energy sector, climate change and international trade so that they complement one another in a harmonious and coherent way. State parties to GPA will need such guidance, so that they benefit from the policy space available under the trade rules to pursue multiple objectives through their government procurement practices. Thus this study generally sees climate-friendly measures being accommodated under the Article XXIII of the GPA. The *US – Shrimp* as well as *Brazil – Tyres* rulings are clear evidence to this effect. GPP under the EU system seems to be a more settled issue as between the Members of the Common Market.[183] However, under the WTO, technicalities still remain especially those associated with the requirements of the *chapeau* to GPA Art. XXIII, and as the discrepancies in the relevant texts of the GATT and compared with those of the GPA, which potentially negates the urgency required in dealing with the climate change challenge, the study would advise for climate-motivated GPP to be

[181] See van Asselt, *supra,* n. 174, at pp. 226-7.

[182] *Ibid.* at p.226

[183] GPP as permitted under the EU system may pose problems to developing countries, in their effort to participate in the procurement sector of international trade. The research however notes that at the moment climate-motivated GPP is not an issue for developing countries who, in any event, do not have binding obligations under the KP to reduce their GHG emissions. They area also not parties to the GPA. See *infra,* Chapter 5 Section 5.4.6.

addressed outside of those exceptions. In other words, a government procurement measure targeted at climate change should more appropriately be handled as the "norm" rather than arguing it under the "exceptions". Accordingly, a case is made for an amendment to the current GPA to create a new provision making it a positive norm. The effect of this positive provision will be the reversal of the procedure on burden of proof so that a complainant is now to prove its claim against the defendant. This study thus seeks to provide the material to fill in this gap in the literature. It will thereby contribute in establishing coherence in the fragmented system especially as between climate change mitigation measures and international trade regulation.

PART II

GOVERNMENT PROCUREMENT POLICIES AND THE LINKAGES BETWEEN THE CLIMATE REGIME AND INTERNATIONAL TRADE REGULATION: *CONCEPTUAL ANALYSIS*

CHAPTER 3

GOVERNMENT PROCUREMENT AND THE EVOLUTION OF THE WTO REGULATION OF PUBLIC PURCHACE

3.1 Introduction

This chapter lays the conceptual foundation of the subject-matter of the research, namely, government procurement (GP) (also referred as as "public purchase" [184]) and how it is regulated under the GPA.[185] The chapter seeks to present the framework and the parameters around which the discussions that follow in the subsequent chapters of the thesis revolve. It introduces the subject of government procurement and highlights its importance and relevance to trade law. Particularly, the chapter highlights how and why GP has been regarded as one of the non-tariff measures (NTMs) which may constitute barriers to trade.[186] In so doing, the chapter traces the historical evolution of the regulation of government procurement from the GATT 1947 through the OECD public procurement guidelines, to the Tokyo Round Public Procurement Code of 1979, and how it culminated in the WTO GPA 1994.

The objective of this chapter, thus, is two-fold. First, it is intended to give an overview of the evolution of government procurement regulation under the WTO system, so as to establish a foundation for the subject-matter of the thesis. The

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[184] Some commentators see "public procurement" as a wider concept, hence, more aptly describes the subject. Public procurement according to Stephen Woolcock, includes purchasing by "government", as well as "by public enterprises and entities, such as in the form of utilities for energy, transport, postal services, telecommunications and water." See Woolcock, S., *The Interaction between levels of rule-making in public procurement,* in Woolcock S. (ed.) Trade and Investment Rule-Making: the Role of Regional and Bilateral Agreements (UNU Press, 2006), p. 108.

[185] See WTO, GPA, *supra,* n. 4.

[186] NTMs are distinguishable from Non-tariff barriers. Whereas NTMs are "policy measures, other than ordinary customs tariffs, that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both, [and] may constitute non-tariff barriers", NTBs, on the other hand are NTM having " a protectionist intent". See a presentation at WTO *Non Tariff Measures Data Day* at 18-19 May 2009 www.wto.org/english/res_e/statis_e/data_day_may09_e/nicita_e.ppt (visited on 14/06/09)

thesis as stated in chapter one essentially seeks to examine the relationship between GPP, climate change mitigation, and the potential trade effects, from the stand point of the GPA. Secondly, the chapter highlights the central disciplines of the WTO multilateral trading system as provided for in the GPA as well as GATT and other WTO agreements as may be relevant and appropriate. These disciplines are:

i. national treatment and non-discrimination;
ii. transparency in government procurement;
iii. the rules on technical specifications of the subject-matter of procurement; and
iv. the GPA general exceptions, and how climate-friendly procurement measures may be treated under those exceptions,

The chapter, in effect, seeks to highlight the major legal and policy issues that raise the potential of conflict between the GPA disciplines and norms, and national climate change mitigation policies.

3.2 Government procurement and the application of the GPA

3.2.1 Government procurement in context

Procurement is generally seen as "the process of acquiring the right goods, works and/or services at the best value, in the right quantity and quality, in the right place, at the right time."[187] Government procurement (GP) as opposed to private sector procurement is the purchase by government of goods and services needed to perform governmental functions.[188] GP includes all governmental expenditure from the acquisition of office pins, paper clips, or computers for use in government offices, or energy and energy/power generating facilities, and armoury in the national defence sector. This acquisition can be by purchase, lease or other

[187] See *Procurement Overview* by Advantage West Midlands and the European Regional Development Fund available at www.advantagewm.co.uk (accessed 25/12/2007).

[188] See Arrowsmith, S., *supra,*, n. 51, p. 1

means.[189] Thus, public procurement encompasses purchase or supplies of goods and equipment, or *works* in terms of construction projects, or *services*[190] such as architectural, financial or legal services as may be required to execute public projects or other governmental functions.

Private sector procurement, on the other hand, is generally the same as public procurement in so far as the conventional procurement objectives are concerned. The fundamental distinction between public and private sector procurement lies in the fact that in public procurement, the purchase is regulated by rules and procedures for public sector spending, expenditure and scarce resources management, while private procurement is subject ot the commercial or other considerations applying to private operator or industry involved in the procurement exercise.

3.2.2 Government procurement and the application of the GPA

GPA applies to procurement by governmental agency acting not for commercial, but for administrative or purely governmental functions.[191] Where a governmental authority conducts procurement acting in a commercial capacity, then this is "state trading" and would be governed by the provisions of GATT Article XVII[192] on the

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[189] Matsushita, M., Schoenbaum, T. J. and Mavroidis, P. C., The World Trade Organisation -Law Practice and Policy, (2nd ed.), The Oxford International Law Library, Oxford, United Kingdom, 2006), p. 740.

[190] There is however "uncertainty over exactly what constitutes 'government procurement' of services." Currently, there is no provision in the GATS on government procurement of services. Indeed while GATS Art. XIII:1 on Government Procurement simply excludes the application of GATS rules to GP, GATS Art. VIII:2 merely directs the WTO Members to commence "multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement". See Hardstaff, P., *From GATS to New WTO Investment Rules – Undermining Pro-Poor Investment Regulation,* Paper to one-day Symposium on *'Investment, Sustainable Development and the WTO'*, Washington, May 22 2003, available at <http://www.wdm.org.uk/resources/reports/trade/fromGATStonewWTOinvestment22052003.pdf>

[191] For a discourse on the distinction between public authorities action on "governmental" or "commercial" capacity, see generally, Malumfashi, G., *State Responsibility in Investment Arbitration: to What Extent Is the State Responsible for Contracts Concluded By State Enterprises and Sub-National Authorities?* Transnational Dispute Management Vol. 2 - issue 1, January 2005 available at: www.transnational-dispute-management.com (last accessed 14/06/09).

[192] The GATT XVII(1) (*a*) states that where a WTO Member establishes or maintains a State enterprise, such enterprise "shall, in its purchases or sales involving either imports or exports, act in a manner

activities of state-trading enterprises (STEs). Thus such purchases would generally be subject to the non discrimination norms of Art. III of the GATT.[193]

The GPA Art. I defines the scope and coverage of the Agreement. The Agreement applies to "any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I."[194] Appendix 1 contains the list of government entities as well as the types of services (including construction services) that each Party offers to be bound by the provisions of the GPA. This is part of the ratification or accession documentation required of each GPA Party. Therefore, only procurement carried out by any of the entities (including whether the entities are at central, sub-central, provincial or local levels) and related to the services (including whether, "negative" or "positive"[195]) mentioned in this appendix, should be subject of the GPA regulation.[196] As for products,[197] the GPA applies to procurement of all products as conducted by the specified entities.

Thus, the Panel in *Korea - Government Procurement*[198] ruling stated that GPA obligations apply only to procurement:

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consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders."

[193] GATT Art. XVII(2) however provides an exception to the above rule. It states that state-enterprises that import products for governmental consumption are exempted from the non-discrimination principles, but are obliged to accord "fair and equitable treatment" to the trade of other Parties.

[194] GPA Art. I:1

[195] Annex 4 of Appendix 1: Negative list contains services not to be subject of the GPA, while the Positive list is for services offered to be covered by the Agreement. For more on the coverage issues, see generally Wang, P., *Coverage of the WTO's Agreement on Government Procurement: challenges of integrating China and other countries with a large state sector into the global trading system,* Journal of International Economic Law, doi:10.1093/jiel/jgm034, 1–34.

[196] The Appendix 1 itself is divided into 5 Annexes

[197] This includes any combination of goods and services, purchase, lease and rental. See GPA Article I:2

[198] *Korea – Measures Affecting Government Procurement,* Report of the Panel, WT/DS163/R 1 May 2000, paras. 27-28. This is the only GP-related dispute under the WTO system. However in the GATT era, there were two other disputes adjudicated based on the Tokyo Round Government Procurement Code, which also do not have a bearing on the environment, and thus not relevant to the issues at hand. For a brief analysis on these reports see Matsuishita, M., *Major WTO Dispute Cases Concerning Government Procurement*, AJWH vol. 1 2006, pp 298-315.

> *(a) by procuring entities that each Party has listed in Annexes 1 to 3 of Appendix I relating respectively to "central government entities," "sub-central government entities" and "other entities";*
> *(b) of all products; and*
> *(c) of services and construction services that are specified in lists found respectively in Annexes 4 and 5 of Appendix I.*

Another condition for the application of GPA to procurement is that it must reach a certain minimum value, called “the threshold” which also is to be specified in the Appendix 1, and for each of the annexes.[199] Article 2 gives further guidelines as to the determination and application of the thresholds. In addition to the Appendices and the Annexes, the GPA also allows parties to insert general notes to annexes by which to make further derogations if required from the commitments listed. Wang has cited an example of such derogation by Canada which excludes all ‘intra-public sector procurement’ from the coverage of the agreement. These are procurement activities conducted between covered entities themselves.[200]

The above stated provisions as to the content of the annexes constitute the offers of commitments made by the Parties to the GPA. However, this does not imply an automatic application of the most favoured nation treatment benefits as between them. There has to be reciprocity of offers multilaterally or bilaterally among the Parties. Thus, before Party A, for instance, enjoys the benefit of an offer from Party B, Party A must have also made an equivalent offer acceptable to Party B as could be read in the A’s Appendix. So also if Party C wants to benefit from offers of A and B (which are equivalent and reciprocal), C must also make an offer as high or valuable as A’s and B’s, in terms of entities or sectors covered. Thus, the application of MFN is circumscribed by the levels of the offers in terms of both the

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[199] GPA Article 1:4. See also WTO, *Government Procurement,* at http://www.wto.int/english/thewto_e/whatis_e/tif_e/agrm10_e.htm (last accessed 06/01/09).

[200] See *Canada, Appendix I, General Notes to Annexes, Note 2,* WT/Let/330, 1 March 2000.

entities and subject-matters of the procurement.[201] Therefore, the GPA has given the Parties considerable freedom to determine for themselves the level and extent of their commitment to the provisions of the GPA. That level of commitment has to be respected.[202]

3.2.3 The objectives of public procurement

3.2.3.1 Primary objectives of procurement: the 'value for money' concept

The purchase of goods and services by government agencies enables government to deliver public services and fulfil related primary and "secondary" government tasks. The primary objectives of GP relate to the functions of the government, namely, provision of basic social services which include security, employment and general welfare services. Thus government spending should have "a significant impact on the efficiency of the use of public funds and, more generally, on public confidence in government and on good governance."[203] Thus, good procurement is essential to ensuring good public services, from buying goods and services that work as they are supposed to, to achieving savings that can be ploughed back into front-line services.[204] The primary objective of GP therefore is essentially about achieving economic efficiency[205] and the attainment of best value for the tax-payer's money. To economists, this objective could be interpreted in more than one sense: it could mean "the purchase of goods that meet certain quality levels, at minimum

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[201] See Arrowsmith, S., *Towards a multilateral agreement on transparency in government procurement,* International and Comparative Law Quarterly, Vol. 47 [October 1998], 796; Wang, P. *supra,* n. 195, p. 14.

[202] This situation has however been regarded by some commentators as a weakness of the GPA. See Wang, P., *supra,* n. 195, pp. 12-14.

[203] See WTO, *General overview of WTO work on government procurement,* available at http://www.wto.org/english/tratop_e/gproc_e/overview_e.htm (last visited 18/10/07)

[204] See HM Treasury, Transforming Government Procurement, (*Foreword by the Financial Secretary to the Treasury*), (United Kingdom Treasury, 2007), p. 1.

[205] See Trepte, P., *supra,* n. 172, p. 63.

cost."[206] It also alternatively means aiming to purchase the highest quality goods or services among a set of similarly priced category of same or similar goods.[207]

This concept imposes a duty on the public sector to manage and spend public money wisely and make continuous improvement in their services in terms of economy, efficiency and effectiveness.[208] This is best achieved where the procurement process is open, transparent, and allows for competition between prospective suppliers, both domestic and foreign.

3.2.3.2 Secondary objectives of procurement

There are however "secondary" objectives of procurement which are also referred to by economists as "non-economic" objectives.[209] Non-economic objectives are those national policy objectives which, when pursued by a government, indicate "the willingness [of a government] to forego potential real income in order to achieve other objectives of national policy."[210] That is to say, they are not aimed at achieving optimum economic efficiency.[211] Thus, governments' use of government resources to pursue social and environmental concerns comfortably falls within this

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[206] See Evenett, S. J. and the Swiss State Secretariat of Economic Affairs (eds.), *Is There A Case For New Multilateral Rules on Transparency in Government Procurement?* (Chapter III of The Singapore Issues and the World Trading System: the Road to Cancun and Beyond, p. 8, (World trade Institute, Bern, 2003).

[207] *Ibid.* See also Arrowsmith, S., Linarelli, J. and Wallace, D., Regulating Public Procurement National and International Perspectives, Kluwer Law International (17 April 2000), 28-29. Value for money is a factor in the determination of the most economically advantageous tender under the EU public procurement system. See *Directive 2004/18/EC Recitals 5 and 46 infra n. 317*. For more on the achieving of "value for money" as the primary objective of GP, see the Statement by Dr. Sean Farren on 16 May 2002 available at http://www.cpdni.gov.uk/ps/index.htm (last visited 29/11/07). See also *Central Procurement Directorate Procurement Guidance Note 02/04 Subject: Evidencing Best Value for Money,* by Department of Finance and Personnel, available at www.cpdni.gov.uk/pdf-public_procurement_policy_summary.pdf (accessed 26/12/08).

[208] *Ibid. Central procurement directorate Procurement Guidance* p. 3.

[209] Arrowsmith, S., *supra,* n. 51, p.15.

[210] See Maneschi, A., *Noneconomic Objectives in the History of Economic Thought,* American Journal of Economics and Sociology, Vol. 63, No. 4 (October, 2004), pp. 911-912.

[211] See Evenett, S. J. and Hoekman, B. M., *Government procurement: market access, transparency, and multilateral trade rules,* European Journal of Political Economy (2004), pp. 3-4.

categorisation.[212] The question therefore is to what extent is *discrimination* allowed in pursuing a non-economic objective of procurement. Also does it make any difference if that non-economic objective sought is climate change mitigation? From another perspective, GPP in which government favours environmental sector is being seen by some commentators as a form of subsidy which could raise concerns with trade law.[213]

And for the proponents of the view that governments should be seen to be actively also dispensing corporate social responsibility (CSR) in the same manner as the private sector, then GPP could provide a suitable avenue for fulfilling that role.[214] The potential of GP to serve this purpose is seen in, inter alia, the size it occupies in the market. This, according to McCrudden, "might be used to encourage the development of 'green' products at an affordable price for the general market, simply by guaranteeing a sufficient number of public purchases to create viability."[215]

3.2.4 The importance and size of government procurement

GP signifies a strategic activity of the government not only as regulator of production processes, but also as a consumer.[216] Through GP, a government shows

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[212] See McCrudden, C., *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the legality of "Selective Purchasing" Laws under the WTO Agreement on Government Procurement,* JIEL, 1993, 3-48 at pp. 7-8.

[213] See also Trebilcock, M. J., and Howse, R., The Regulation of International Trade (3rd Edition), Routledge, Oxon, United Kingdom 2005), p. 292. See also Steenblik, R. P., *A Subsidy Primer,* (Global Subsidies Initiative/IISD), undated, available at: http://www.globalsubsidies.org/subsidy-primer/ASubsidyPrimer.php#18 (accessed 26/02/09).

[214] See McCrudden, C., *Corporate Social Responsibility and Public Procurement*, in McBarnet, D., Voiculescu, A. and Campbell, T. (eds.), The New Corporate Accountability: Corporate Social Responsibility and the Law, Cambridge University Press, 2007; Oxford Legal Studies Research Paper No. 9/2006. Available at SSRN: http://ssrn.com/abstract=89968 (last accessed 10/12/08).

[215] *Ibid.* p. 12. Japan has successfully used green procurement of low emission cars to stimulate technological innovation in the automobile industry. See McCrudden citing Cowe, R. and Porritt, J., *Government's Business: Enabling Corporate Sustainability* (Forum for the Future, 2002), p. 33.

[216] See EC, *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee* [Brussels, 5.5.2009 COM(2009) 215 final]: Contributing to

leadership in public resource management. Because of the enormity of its responsibilities, government is a significant spender of money making it a major source of business and economic activities in the polity.[217] Thus the government uses its purchasing power to provide essential social services, and promote various domestic social and political policies.[218] The exercise of this purchasing power in respect of some of those policies, as will be seen later, tends to affect the government's other obligations under international trade rules. The size of the GP market[219] also underscores its significance in trade policy. According to the Organisation for Economic Cooperation and Development (OECD), total world procurement was approximately $5.5 trillion in 1998.[220] GP represents up to 18% of the GDP in the OECD countries, and in the EU it amounts to 10-25% of the GDP.[221]

The GP market is even larger in North America, where for instance, governments, in 2002, "spent US$3 trillion out of the total US$11 trillion economy"[222]

Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability assurance schemes available at:

[217] For further discussion on the significance of GP, see Arrowsmith, S., Linarelli, J. and Wallace. J. D., *supra,* n. 207, pp. 7–11. See also Bhandarkar, M., and Alvarez-Rivero, T., *From supply chains to value chains: a spotlight on CSR,* in O'Connor, D. and Kjollerstrom, M.(eds.), Industrial Development for the 21st Century, (Zed Books, London, United Kingdome, 2008), p. 391

[218] See Trebilcock, M. J., and Howse, R., *supra,* n. 213, pp. 292-293.

[219] The most comprehensive study on the market size occupied by government procurement in its multifarious facets and considerations is by the OECD: Audet, D., *Size of Government Procurement Markets: Synthesis repor*t in the OECD Journal on Budgeting, vol. 2 No. 3, pp 143- 195 (OECD, 2002). See generally, OECD, *Greener Public Purchasing: Issues and Practical Solutions,* (Paris, 2000)."

[220] See Yukins, C. R., And Schooner, S. L., *Incrementalism: Eroding the Impediments to A Global Public Procurement Market,* 38 Georgetown Journal of International Law 529 (2007) available at: *http://ssrn.com/abstract=1002446* [visited on 27/12/09), pp. 533-534.

[221] See Eppel, S., *Enhancing Markets for Climate Friendly Technologies: Leadership through Government Purchasing Strategies,* (Volume I) (Climate Technology Initiative, Paris, France, June 1998, (available at http://www.climatetech.org/pdf/2rpt123.pdf) citing OECD, C (96)39/FINAL: *Council Recommendation Improving the Environmental Performance of Governments,* (undated). See also Zhang and Assunção, *supra,* n. 149, at p. 12. See also Curran, C., *Green in Europe: how green is public procurement in the European Union?* (Society of Chemical Industry, 2002) available at http://www.highbeam.com (last visited 17/06/07).

[222] For detailed statistics on the North America see The Environmental Magazine (2002), *Harnessing the Procurement Power of Governments, Hospitals, Colleges and Corporations to Protect the Environment,* 8 November 2002, available at http://www.enn.com/news.enn-stories/2002/11/110802/s_48684.asp (accessed 17/06/07).

Looking at GP at national government level, the public sector of the United Kingdom alone "spends £125 billion annually on procuring goods and services,"[223] for the performance of its everyday functions. Similarly, the Canadian federal government spends $13 billion each year on purchase of goods and services.[224] In the US, the government expenditure in 2002 amounted to $1.98 trillion equivalent to 19.96% of the GDP.[225] The contestable[226] share of this figure amounts to 6% according to OECD records. The average contestable government procurement for all OECD countries is 7.6 % of GDP which is equivalent to $1.795 trillion annually.[227] In 2006, it was expected that, during fiscal year 2007, the US federal procurement market alone accounted for approximately $400 billion.[228]

For developing countries, of the 106 countries surveyed, 40 accounted in 2001 for about 5% ($287 billion) in total contestable markets, which is equivalent to about

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[223] See Transforming Government Procurement, *supra,* 204, p. 1.

[224] See *2005 September Report of the Commissioner of the Environment and Sustainable Development*, Canada *(Chapter 5: Green Procurement),* available at: http://www.oag-bvg.gc.ca/internet/docs/c20050906ce.pdf (last accessed: 30/08/08).

[225] See OECD, *The Size of Government Procurement Market*, 1 OECD J Budgeting (2003). See also Woolcock, S., *supra,* n. 184, p. 107-108; See also Swiss-US FTA Chapter (6): *Government Procurement* in Institute for International Economics, p. 190 (available at www.iie.com); Evenett, S. J., and Hoekman, B. M., *Government Procurement: Market Access, and Multilateral trade Rules, supra*, n. 211; Evenett, S. J., *supra,* n. 165, pp. 10-11. See also Communication from the EC and their Member States, (WTO, S/WPGR/W/39) 12 July 2002.

[226] According to Will Baumol, developer of the theory of "Contestability", "Contestability is not a synonym for competition but rather refers to a situation where a provider faces a credible threat of competition." In simple terms, contastable procurement is where the market is opened or widened to accommodate more suppliers. See Baumol, W. J. and Willig, R. D., "Contestability" in *International Library of Critical Writings in Economics*, 126 (Volume 3) (2001), pp. 493-520, available at http://www.serco.com/instituteresource/subjects/marketdev/contestability/index.asp (accessed on 25/11/07).

[227] For more statistics on especially on OECD Countries' public procurement share as a percentage of GDP see OECD, *The Size of Government Procurement Markets,* (2001), available at http://www.oecd.org/document/63/0,3343,en_2649_34487_1845951_1_1_1_1,00.html (last accessed 29/11/08);

[228] See *Report of the Acquisition Advisory* Panel *to the Office of Federal Procurement Policy and the United States Congress December 2006,* available at: https://www.acquisition.gov/comp/aap/documents/DraftFinalReport.pdf (last visited: 20/06/10).

1/6th of the total OECD market. About 60 of the 106 of the developing countries had public procurement figure of less than $1 billion per annum.[229]

These figures thus illustrate the influence governments have over markets. Hence, GP is considered an "important aspect of international trade"[230] which could benefit domestic and foreign businesses in terms of increased competition.[231] Added to these expenditures is the governmental authority and responsibility which empowers public bodies to take measures necessary for the performance of their social functions. In view of the enormous resources being expended, governments consider green procurement could make a significant difference in their efforts to reduce emission. It is in this connection that the EU, Canada and other governments loaded with Kyoto commitments started purchasing practices with environmental considerations so as to reduce GHG emissions for climate change mitigation.[232]

3.2.5 The conventional GP processes

In its broadest sense, GP covers "both the action and the process" of governments or their agencies, to acquire goods and services for their own consumption and needs.[233] The processes of GP are regulated usually by procurement rules or guidelines adopted by government. The processes begin after an entity has decided

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[229] *Ibid.* For more analysis on this, see also Peng, S., *Multilateral Disciplines on Service Procurement: Architectural Challenges Under the GATS,* Journal of World Trade and Investment Vol. 7 No. 6 2006), p. 1-2.

[230] See WTO, *Government Procurement* at http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm (last visited 24/11/10). See also Evenett, S. J., and Hoekman, B. M., *supra,* n. 211, p. 33.

[231] *Ibid.*

[232] For green procurement in North America, see generally, Commission for Environmental Cooperation of North America (CEC), *Green Procurement: Good Environmental Stories for North Americans,* (Prepared by Five Winds International, March 2003), available at http://www.cec.org/files/pdf/ECONOMY/2003-GreenProcurementReview_en.pdf (accessed on 10/08/10).

[233] See GATT Multilateral Trade Negotiations Group ("Non-Tariff Measures"): *Government Procurement* (Note by the Secretariat) (MTN/NTM/W/16 5 August 1975), para. 7.

on its requirement, and continue through to and including contract award.[234] The process typically involves the following stages: tendering, evaluation, and award notification and review procedures. Tender notices are published in accordance with applicable regulations to invite tender from suppliers of goods or services. The notices define the need for the procurement and provide for the *technical specifications* of the goods/services required. The specification may in principle include the manner and time in which those goods are produced. Suppliers submit tenders or express interest to bid and the procurement authority evaluates the tenders submitted against various pre-set selection and award criteria. These criteria are usually communicated early to the prospective tenderers as part of the procurement notice. The contract is then awarded to the best bidder. Best bidder, pursuant to the *best value for money*, is in principle, the one that offers the best quality goods or services required at the best (lowest) price possible. After the publishing of the award, a review process may follow where there is complaint from any aggrieved bidder.

For each of the above mentioned stages in the process of public procurement, opportunities abound for public procurement authorities to introduce the secondary objectives. Chapter 5 shows how environmental considerations are incorporated in the processes.

3.3 Government procurement and international trade concerns

This section reviews a brief history of how GP was seen as a non-tariff measure having the effect of a trade barrier, and which has historically raised concerns in international trade regulations. The trade concerns would apply to GPP which is a specie of GP.

[234] See definition of procurement by Canada in *Canada.*., Appendix I, General Notes to Annexes, Note 2, WT/Let/330, 1 March 2000.

3.3.1 Government procurement as a *non-tariff* measure

Historically, multilateral trade negotiations under the GATT were structured so as to facilitate free flow of cross-border trade by reducing and eliminating tariffs[235] that stood as barriers.[236] Indeed, the first six Rounds of the GATT multilateral trade negotiations[237] were primarily devoted to tariffs reductions.[238] This however is not to say that GATT did not address non-tariff measures (NTMs) too. Indeed, quantitative restrictions (QRs)[239] which exemplify NTMs have been an integral part of the GATT regulation right from inception.[240] The GATT process succeeded in that "limited field"[241] of tariff reduction. However, GATT Contracting Parties (GCP)[242] subsequently resorted to NTMs other than QRs, which, according to the United

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[235] Customs tariffs are duties charged on goods at the time of importation into a country or region. They are a source of revenue for the government, and could protect domestic industry facing foreign competition. See Sumner, D. A., Smith, V. H., and Rosson, C. P., *Tariff and Non-Tariff Barriers to Trade,* [Centre of Advanced Studies and Applied Economics (CEPEA) (undated)] available at: www.cepea.esalq.usp.br/pdfs/130.pdf (accessed on 19/11/08).

[236] WTO, *World Trade Report 2007*: *Six Decades Of Multilateral Trade Cooperation: What Have We Learnt?* 234 (WTO Secretariat, Geneva, 2008).

[237] These were: Geneva Round 1947, Annecy Round 1949, Torquay Round 1951, Geneva Round 1956, Dillon Round 1960-1961 and Kennedy Round 1967. The Kennedy Round also initiated some trade negotiations on antidumping measures. See Dam, K. W., The GATT Law and International Economic Organisation, (University of Chicago Press, Chicago, USA, 1970. For the subsequent rounds, see WTO, *"GATT's Years* at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (accessed last, 15/11/08).

[238] WTO, *World Trade Report, 2007*, *supra, n.* 236, p. 234. See also *Practices and Procedures Government Procurement in Africa, by Economic Commission for Africa* (December 1997), p.1 *(available at http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN003894.pdf (accessed on 16/11/08).* which found that Tariff barriers on manufactured products in the nine leading industrialized countries decreased from an average of 40 percent when GATT was founded in the late 1940s to less than 4 percent at present:

[239] These are limits specifically set by governments on the quantity or value of goods that can be imported (or exported) during a specific time period. An example is an import quota, where a quantitative restriction on the level of imports is imposed by a country. This protects domestic industry or suppliers from foreign competition, prohibited under GATT Art. XI.

[240] Indeed, the GATT was said to have been drafted because certain countries did not want to wait till the coming into effect of the Havana Charter before they commence tariff negotiations. They thus included in the GATT Part II provisions regulating NTMs so that they (NTMs) did not prevent the benefits accruing from (or the nullification or impairment of) tariff concessions. See GATT Group on Quantitative Restrictions and Other Non-Tariff Measures, *Past GATT Activities Relating to Quantitative Restrictions and Other Non-Tariff Measures,* (NTM/W/2, 24/ Feb., 1983), 5.

[241] See WTO*, Understanding The Wto: Basics: The GATT years: from Havana to Marrakesh, at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm* (last accessesd, 18/09/10).

[242] "GATT Contracting Parties" is the official name for the governments that had signed GATT 1947. Upon signing the new WTO agreements (which include the updated GATT, known as GATT 1994), they

Nations Conference on Trade and Development (UNCTAD) almost replaced the tariffs, many of them curtailing free-flow of cross-border trading.[243]

There were thousands of NTMs as gathered from an inventory conducted by the GATT Committee on Trade in Industrial Products (CTIP) which was set up under the auspices of the GATT Programme for Expansion of International Trade.[244] Five working groups were established under the CTIP to analyse the NTMs as they relate to five sub-heads, one of which addressed government participation in trade.[245] On further examination of the NTMs, government procurement was among those regarded as constituting a trade barrier[246] and for which regulations were needed. One of the major achievements of the Tokyo Round was the conclusion of the Agreement on Government Procurement and five other codes targeted at reduction of obstacles posed by these NTMs.

The GATT CTIP on the inventory of NTMs examined twenty-five notifications relating to government procurement, and elected eleven of them as being

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officially became known as "WTO Members". See more on the GATT/WTO history at http://www.wto.org/english/theWTO_e/whatis_e/tif_e/fact4_e.htm (last accessed ....)

[243] See generally, UNCTAD, *Report of the Expert Meeting on Methodologies, Classifications, Quantification and Development Impacts of Non-Tariff Barriers,* Geneva, 5-7 September, 2005, available at http://www.unctad.org/en/docs/c1em27d2_en.pdf (last visited 30/11/07). According to UNCTAD analysis, NTBs embody a wide variety of policy measures. UNCTAD distinguishes three general groups of NTBs based on their links with trade: i) directly trade-related NTBs (e.g. import quotas, antidumping measures, etc.); ii) NTBs that have a link with trade since their implementation is monitored at the border (e.g. SPS measures, and packaging,); iii) NTBs that appear from general public policy (e.g., government procurement, and investment restrictions) (UNCTAD, 2005).

[244] CTIP was mandated to, inter alia draw up and analyse an inventory of non-tariff and para-tariff barriers affecting international trade. See report of the first meeting of the CTIP held on 17 and 18 October 1968 (L/3083 28 October 1968). The initial list of the NTMs is found in GATT document BISD 15S/69. See also UNECA, *Practices and Procedures Government Procurement in Africa,* (Economic Commission for Africa, December 1997, 1.

[245] *Ibid.* para. 19. And the other four are those concerning customs and administrative entry procedures, standards involving imports and domestic goods, specific limitations on trade, and charges on imports .

[246] See GATT *Group on Quantitative Restrictions and Other Non-Tariff Measures, supra,* n. 240. paras. 19-21).

representative of the problems that arise in this area.[247] These include: (a) Preferential price treatment generally for products of indigenous origin; (b) Preferential price treatment for the products of certain domestic socio-economic groupings and product groups; (c) Inadequate notice to foreign bidders and advance notice of prospective contracts being given only local publicity; (d) Short time periods for bidding; (e) Requirement that foreign firms operate through local counterparts; (f) Predominant use of the technique of selective tendering; (g) A specified percentage of government purchases to consist of products from a particular geographical area; and (h) Specified products are closed to foreign competition by the use of the technique of selective bidding.[248]

According to UNCTAD, GP policies and practices could constitute an NTB[249] especially if they discriminate in favour of domestic suppliers when competitive imported goods are cheaper or of better quality. This, according to Arrowsmith, "may distort the natural patterns of international trade, creating inefficiencies in the global economy."[250] Governments usually adopt discriminatory procurement procedures in order to pursue the secondary *non-economic* social polices other than the "value for money" objectives. For instance, the government utilises its procurement power to assist infant industries, improve the condition of a geographically disadvantaged social group, raise labour standards or aim at higher environmental protection. In the case of climate-friendly procurement, governments engage in GPP not as a domestic environmental protection policy but also seeking to comply with their obligations under the KP.

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[247] GATT *Multilateral Trade Negotiations Group on Non-Tariff Measures*: *Government Procurement*: - Note by the Secretariat [MTN/NTM/W/16] 5 August 1975) para. 9

[248] *Ibid.* pages 4-5.

[249] See generally, UNCTAD, *Report of the Expert Meeting,* supra n. 243.

[250] Arrowsmith, S., *supra,* n. 51, 794.

Such domestic preferences can be both overt expressed in legislation or policy statements, and also covert, occurring only in the way legislation or policy is implemented. These two situations respectively may lead to what is referred to as "de-jure" or "de-facto" discrimination.[251] A classic example of an overt use of GP for domestic preferences seen in the US legislation, the *1933 Buy American Act*[252] and the *2009 American Recovery and Reinvestment Act*[253] by which US public authorities in charge of procurement were instructed, under certain conditions to buy only American products or from American firms. Thus Van den Bossche stated: "[WTO] Members are often politically and/or economically 'compelled' to adopt legislation or measures which are inconsistent with the rules of WTO and, in particular, with the principles on non-discrimination and the rules on market access."[254]

Indeed, some captains of the US domestic manufacturing industry hailed the buy-American stimulus provision as "potential recovery multiplier and significant policy

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[251] "De jure" and "de facto" discrimination were defined by the Panel in its Report, *Japan — Measures Affecting Consumer Photographic Film and Paper,* WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, as follows: a *de jure* discrimination is "a measure that discriminates *on its face* as to the origin of products", while a *de facto* discrimination is "a measure that in its application upsets the relative competitive position between domestic and imported products". See also the AB Report in *Canada – Autos*. Thus, discrimination is said to be *de jure* where it is "explicitly stated in national law or published regulations". But it is *de facto* where it "results from the implementation of those laws and regulations". See Evenett, S. J. and the Swiss State Secretariat of Economic Affairs, *supra*, n. 206, p. 9.

[252] The *Buy American Act* (41 U.S.C. § 10a-10d) (BAA) initially enacted 1933 explicitly restricted the Federal agencies from the purchase of supplies, which were not domestic products, if intended to be used within the US. They were required to procure only US mined or produced unprocessed goods. Domestic end product is determined under the Act as follows: if (a) the article is manufactured in the US; and (b) if the cost of domestic component exceeds 50% of the cost of the entire components making up the product. Foreign end product could be purchased only if the price of the lowest domestic offer was unreasonable. For analysis on preferential procurement based on the *Buy American Act* and its impact on the GATT/WTO GPA see Tiefer, C., *The GATT Agreement on Government Procurement in Theory and Practice,* 26 U. Balt. L. Rev. 31 (1996-1997), pp. 32-34.

[253] The US President Obama's $787 billion economic stimulation package issued as a response to the global recession that hit harder on the US economy in 2008. The Act in Section 1605(a) obliges all relevant government departments and agencies to ensures that "all of the iron, steel and manufactured goods used in the project [funded from funds provided under the Act] are produced in the United States."

[254] See Van den Bossche, P., The Law and Policy of the World Trade Organisation: Text, Cases and *Materials*, (Cambridge University Press, 2005), p. 597.

precedent", [255] and actually calling for presidential enforcement as key to maximizing benefits, including in the green manufacturing sector.[256]

On the covert discriminatory GP policies Trebilcock and Howse[257] have outlined possible instances. These include "price differentials applied against foreign bids,"[258] "discounts for domestic content of the bid," "selective sourcing" and "set asides."[259] Covert or hidden discrimination is origin-neutral, and could emanate from manipulation of tendering procedures in such a way as to exclude foreign competition, e.g., by using what is referred to as "selective tendering" procedure, or giving short deadlines in order to suit domestic suppliers. Particularly, covert discrimination could result from setting of technical specifications that require products or services standards which are only readily met by domestic producers. This as has been noted is an area where climate-friendly procurement policies may arise.[260]

A recent study by the OECD Joint Working party on Trade and Environment, which surveyed the types of NTBs that exporters of environmental goods and associated services encounter in foreign markets, found covert protectionism through GP as

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[255] See Kearns K. L., and Tonelson, A, *Buy-American Provision in Stimulus Bill Sets Important Precedent,* The AmericanEconomicAtlert.org at http://www.americaneconomicalert.org/view_art.asp?Prod_ID=3170 (February 15, 2009).

[256] *Ibid.*

[257] See Trebilcock and Howse, *supra,* n. 213, p.293

[258] BAA 1933 is a good example here. It required the US government to purchase—for public use only—domestic end products, if they were available domestically at a reasonable price. For highlights on the operational conflicts between BAA and the US Trade Agreements Act (TAA) see *Buy American Act—Help for United States Manufacturers,* Government Corner, Contract Management / April 2002, pp. 42-43 (Available at: http://www.accessmylibrary.com/coms2/summary_0286-62525_ITM) (accessed 10/12/08). Under the EU procurement system too, some option of 5% preference was provided for EU suppliers, while under the Indian system, it is 15% preference for small and medium scale Enterprises. For this, see Woolcock, S., *supra,* n.184.

[259] See Trebilcock and Howse, *supra,* n. 213, p. 293.

[260] See Zhang and Assunção, *supra,* n. 149.

still prevalent.[261] GP was one of the areas found as a "major" and "prohibitive" problem.[262] This practice was observed mainly in France, Austria and the United States. The complaints against GP were not per se based on GPP practices of the importing countries but due mainly to the procedural constraints imposed at the border which constrained the free flow of transactions.[263]

3.3.2 The evolution of government procurement regulation in trade law

The history of the GATT shows a marked caution in the way GP was subjected to regulation within the multilateral trading system (MTS). This is because while the MTS would require the observance of, inter alia, the non-discrimination obligations, governments hold GP as a special area or tool of intervention in the market economy. Governments thus are reluctant to surrender this area too, and subject it to international competition.[264] The regulation started, since the beginning of the multilateral trade negotiations in 1946, with GP enjoying explicit exclusion from one of the two principal disciplines of the MTS, namely, the national treatment under the GATT Art. III.

Thus this situation which permitted government to pursue discriminatory government procurement policies continued until the Tokyo Round of multilateral trade negotiations when the first government procurement agreement, the "Tokyo

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[261] The study conducted by Fliess, B., and Kim, J., is entitled: *Business perceptions on Non-Tariff Barriers facing Trade in Selected Environmental Goods and associated Services,* [OECD Trade and Environment Working Paper 2007-02 Part I] (OECD COM/ENV/TD(2006)48/FINAL), pp. 24-26. The study surveyed 136 exporting firms from ten OECD and non-OECD countries. The study documented the incidence, and impact of, non-tariff measures that are perceived as barriers to trade in seven sectors of environmental goods and associated services. The study found government procurement procedures inter alia as constituting a barrier. The project was aimed at filling in the information gap on the specific problems that firms encounter in their export activities, so that the DDA which has a mandate to address such trade barriers could be informed. Both parts I and II of the report could be accessed at http://www.olis.oecd.org/olis/2006doc.nsf/LinkTo/NT00009532/$FILE/JT03231824.PDF (accessed 13/09/08).

[262] *Ibid.*

[263] *Ibid.* Part II report of the same study, especially on p.46.

[264] Didier, P., *The Uruguay Round Government Procurement Agreement Implementation in the European Union,* in Hoekman and Mavroidis (eds.), Law and Policy in Public Purchasing –The WTO Agreement on Government Procurement, (The University of Michigan Press, 1997).

Round Government Procurement Code"[265] was negotiated on a *plurilateral* basis. This code, which came into force in 1979, provided for the non-discrimination treatment obligations. The code was revised during the Uruguay Round of Trade Negotiations to produce the WTO GPA which was signed in 1994 and came into force in 1996.

This section highlights the gradual approach adopted in the regulation of GP from its exclusion from the GATT non-discrimination norms, to the WTO GPA which re-incorporated those norms.

3.3.2.1 Exclusion of government procurement from the GATT

Despite its importance and strategic position to international trade, GP was traditionally placed outside the non-discrimination norms of the multilateral trading system[266]. GATT Art. III:8(a) explicitly excluded GP from its ambit, thus:

> "The provisions of this Article shall not apply to *laws, regulations or requirements* governing the procurement by governmentalagencies of products purchased for governmental purposes and not with aview to commercial resale or with a view to use in the production ofgoods for commercial sale."[267]

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[265] *The Tokyo Round Government Procurement Code,* opened for signature at Geneva 12th day of April 1979, came into force in 1981 (available at http://www.worldtradelaw.net/tokyoround/procurementcode.pdf)

[266] The term "Multilateral Trading System", according to Van den Bossche, consists of six "basic rules and principles" for the regulation of international trade under the WTO law. These are: (1) the principles of non-discrimination, (2) the rules on market access, including rules on transparency, (3) the rules on unfair trade, (4) the rules on conflict between trade liberalisation and other societal values and interest, (5) the rules on special and differential treatment for developing countries, and (6) the rules and institutions for dispute settlement. See Van den Bossche, P., *supra,* n. 254 at pp 38-39.

[267] [Emphasis added] See also GATT Arts. XVII:2 which also excludes the provision of GATT Art. I in relation to the governmental purchases made by State Trading Enterprises (STE), thus:

> *The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.*

Paragraph 1 of this Article in turn requires WTO Members to ensure that any State Trading Enterprise they maintain, "act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders." The principles of non-discriminatory treatment which have been excluded here are those contained in GATT articles I and III. See more on the government responsibility for STE's commercial purchases, in

As GATT Art. III is all about national treatment (NT) obligation it will seem this exclusion does not include the MFN obligation (GATT Article I). However, in view of the intricate relationship between these two most important principles in trade regulation, it is arguable that MFN obligation is also excluded even as there is no equivalent exclusionary provision in the body of Art. I similar to the GATT Art. III:8(a) cited above. For a start, the two principles are complementary to one another. While the MFN obligation requires the WTO Members, in their treatment of internationally traded goods, not to discriminate between countries (WTO Members), the national treatment obliges them not discriminate against foreign countries' goods.[268] So the obligations in practice may overlap, to the extent that dispensation in respect of one of them may affect the full operation of the other.

Indeed, this scenario is demonstrated by the fact the GATT Art. I makes reference to GATT Art. III:2 and 4. This means that if the application of the GATT III is excluded, this inevitably will affect the operation of GATT Art. I at least to the extent of the significance of the interconnection between the provisions cross-referenced. This view seems endorsed by some commentators, among them John Jackson, who observed thus, "[G]overnment procurement practices have traditionally been considered unreached by the language of GATT Art. I, and GATT Art. III."[269] He added that Art. I on MFN obligation is included arguably because it made reference to the obligations of the GATT Art. III:2 (taxes) and III:4 (domestic regulation).

Irwin, D., Mavroidis, P. C. and Sykes, A'. O., The Genesis of the GATT (Cambridge University Press, 2008), p. 159.

[268] Van den Bossche, *supra,* n. 254, ps. 40 and 308.

[269] See Jackson, J. H., The Jurisprudence of GATT and WTO (Cambridge University Press, 2000), 63. GATT Arts. I and III are concerned with the MFN and national treatment disciplines of the WTO system. See also Gabilondo, J. P., *Dispute Settlement in International Trade, Investment and Intellectual Property,* Module 3.12: Government Procurement, (UNCTAD, New York, 2003).

Practice under the GATT also supports this interpretation.[270] For instance, the GATT Panel ruling on *Belgium – Family Allowances*[271] found that tax exemptions for products purchased by public bodies, was an "internal charge" within the meaning of Art. III:2, should be administered not only on MFN basis, but also, by virtue of the reference of GATT Art. I:1 to GATT Art. III: 4 as stated above be subject of NT obligation.[272] However, the exclusion provision of GATT Art. III:8(a) refers to "laws, regulations or requirements or requirements". Thus "internal taxes or charges" imposed after the product has crossed the border, according to the *Belgian – Family Allowances* Panel, are not covered by the exemption.[273] In other words, the subject-matter (tax exemption) was an issue extreneus to the Belgian procurement laws, or regulations, or procurement.

The exclusions of GP from the GATT NT obligation were also contained in the Havana Charter of 1948 which proposed the International Trade Organisation (ITO).[274] Art. 18:8(a) of the Charter says:

> The provisions of this Art. shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

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[270] See Jackson, J., The World Trading System: Law and Policy on International Economic Relations, (2nd Ed.), p 38, (The MIT Press, Cambridge, United Kingdom, 1997), p. 225.

[271] See GATT Panel Report, *Belgian Family Allowances (Allocations Familiales*) adopted by the CONTRACTING PARTIES on 7 November 1952 (G/32 - 1S/59). See also Van Calster, G., *Procurement and the World Trade Organisation: Purchase power or pester power?,* in Cottier, T., *et al* (eds.), *supra,* n. 11.

[272] See *Ibid.* para. 3. See more analysis on this in Charnovitz, S., *Belgian Family Allowances and the Challenge of origin-based discrimination*, World Trade Review (2005), 4: 1. 7-26 at 8.

[273] *Belgian – Family Allowances (Panel),* para. 4.

[274] See *Final Act of the United Nations Conference on Trade and Employment* adopted at the United Nations Conference on Trade and Employment, Havana, Cuba on March 24, 1948 by 54 countries. The ITO was intended to be a charter for an international trade organisation to serve then, the purpose the WTO Agreement is now serving now, namely to provide for an umbrella organisation to coordinate the implementation of the GATT 1947. The charter ultimately failed, principally because the Congress of the United States would not ratify it. On the history of the GATT/ITO relationship, and the eventual demise of the ITO, see Hudec, R. E., The GATT Legal System and World Trade Diplomacy (2nd ed.) (Butterworth Legal Publishers, 1990), pp. 3-59.

It should be noted that the initial drafts of the charter (the "Suggested Charter" for an ITO[275]) which was tabled by the U.S.A., indeed included, in Arts. 8 and 9, specific reference to public purchasing under the MFN and NT obligations.[276] At that stage the US had sought that these disciplines woul be required to be observed only with respect to central government purchases, with the exceptions to apply only to specific areas of defence and military establishment procurement[277]. This however met with opposition from many of the signatories mainly because GP was too close to sovereignty to permit regulation that time, and would create unsommountable problems of compliance.[278] Other arguments include the potentially high compliance costs involved;[279] and the concern that the use of explicit preferences for national suppliers, such as through 'Buy American Act' provisions would undermine the effectiveness of the agreement. It was also considered that an attempt to reach agreement on such a commitment would lead to exceptions almost as broad as the commitment itself. Indeed, there was the implicit desire on the part of many governments to retain procurement as an instrument of industrial policy.[280]

A more decisive basis of the objection had to do with national security concerns since many domestic suppliers for public goods were also the manufacturers and suppliers of merchandise related to intelligence, military and other security-related

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[275] See U. S. Suggested Charter, Department of state Publication no. 2598 (1946), 4.

[276] See Blank, A. and Marceau, *The History of the Government Procurement Negotiations since 1945,* Public Procurement L.Rev. (1996) 77, pp. 31-31.

[277] See Jackson, World Trade and the Law of GATT, (The Bobs-Merrill Company Inc. 1969), pp. 290-291. See also Woolcock, S., *supra,* n. 184, p. 113. For analysis on the motives for procement restrictions, see also Dam, K. W., *supra* n. 237, P. 200-202.

[278] See Woolcock, S., *supra,* n. 184.

[279] *Ibid*., p. 113. There was also high compliance cost as one of the concerns put fowad by Britain in opposing the inclusion of the national and MFN treatment obligations pursuant to the Havana Charter and GATT in relation to government procurement.

[280] See Woolcock, S. *supra,* n. 184; Blank, A. and Marceau, *supra*, n. 276.

issues.[281] The exclusions thus prevailed in the final act of the Havana Charter in line with what was already in the GATT then.

The same exclusion was later adopted in the GATS.[282] On this, the GATS is more explicit and does not allow room for controversy as to the scope of what is excluded. The GATS Art. XIII:2 provides thus:

> "Articles II, XVI and XVII shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale."

Articles II, XVI and XVII referred to above, concern the WTO Members' obligations on MFN, market access and national treatment respectively. It is clear therefore that the GATT's exclusion is broader as it includes also market access commitments, and it is more explicit as regards MFN.

3.3.2.2 The 1979 Agreement on Government Procurement

The exclusion of GP from the main disciplines of the multilateral trading system coupled with the fact that it featured prominently in the list of non-tariff measures made it a "serious problem"[283] to the system. In order to address that "problem", Working Group 1 (WG1) of the CTIP[284] was assigned the task of "examining possibilities for concrete action in the area of government procurement",[285] as the

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[281] See Dam, K. W., *supra* n. 237, P. 200-202; Tiefer, C., *supra,* n. 252, p. 33 and Arrowsmith, S., Linarelli, J. and Wallace, D. *supra,* n. 207, p. 251.

[282] See van Calster, G., *Shades of Grey, supra,* n. 39.

[283] See GATT, Multilateral *Trade Negotiations Group"Non-TariffMeasures" GOVERNMENT PROCUREMENT Note by the Secretariat [MTN/NTM/W/16] 5 August 1975*, p. 1. See also Jackson, J., World Trade and the Law of the GATT, *supra,* n. 277, p. 292.

[284] See *Ibid.* GATT MTN/NTM/W/16, p.1

[285] *Ibid.*

"solution lay in the formulation of a code or set of guidelines that would apply to government procurement operations."[286]

Incidentally the OECD had already started working on this issue. For instance, it launched in 1963 a survey of national procurement policies of its member states, and this led to further discussions on the rules to promote competition and transparency in government procurement.[287] It was agreed to codify detailed procedures to apply to procurement above certain thresholds. The works under the OECD resulted in the production in 1973 of *Draft Instrument on Government Purchasing Policies, Procedures and Practices.*[288] This draft served as a framework for the GATT works on agreement on government procurement.[289]

The OECD code thus generally provided the model to guide the works of the WG1 which produced proposals for Tokyo Round negotiations (1973-79). The result of the negotiations was the adoption of the *Tokyo Round Government Procurement Agreement of 1979.*[290] This Agreement was *plurilateral* in nature. It subjected GP to international competition by extending the national treatment and MFN obligations "with regard to all laws, regulation, procedure and practice regarding

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[286] *Ibid.*

[287] See Woolcock, S., *supra,* n. 184.

[288] See GATT, *Multilateral Trade Negotiations Group "Non-tariff Measures" Sub-Group "Government Procurement"* Meeting of March 1977 (MTN/NTM/29) [available at: http://www.wto.org/gatt_docs/English/SULPDF/91980059.pdf], where it was agreed to request the OEDC to, make available to the Sub-Group, the *OECD 1973 of Draft Instrument on Government Purchasing Policies, Procedures and Practices*. This was also reflected in McRae, D. M. and Thomas, J. C., *The GATT and Multilateral Treaty Making: The Tokyo Round,* AJIL Vol. 77, No. 1 (Jan., 1983), pages 57 and 64. See also Macrory, P. F. J., Appleton, A. E. and Plummer, M. G., The World Trade Organization: Legal, Economic and Political Analysis: Vol. 1-3 (Springer, 2005), 1129.

[289] *Ibid.*. See also Mosoti, V., *Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya,* in *ICLQ* vol. 54, July 2005, p. 638: "The OECD was the earliest forum at which discussions on a possible multilateral framework agreement on government procurement took place."

[290] The *GATT Agreement on Government Procurement*, opened for signature at Geneva 12th April 1979, came into force in 1981. It was amended in 1987 which amendment also entered into force in 1988, [hereinafter "the 1979 GPA"], available at: http://www.worldtradelaw.net/tokyoround/procurementcode.pdf

procurement"[291] by the entities specified. This obligation however was conditional upon mutual reciprocal promises between the signatories.[292] It also required the members to observe transparency rules at all stages of the tendering processes: from advertisement of contracts, submission, receipt and opening of tenders and the ultimate award of the contracts. Provisions were also made in the Agreement for special and differential treatment for developing countries.[293]

Thus the 1979 GPA, though still limited in its coverage, was described as "an outstanding reversal of more than fifty years of international trade and economic history".[294] The limit in respect of its coverage can be seen in the fact that it covered only the procurement of goods.[295] It also did not cover purchase of arms and military hardware. The threshold was also limited to cover procurement of the value of US$190,000 [equivalent to Special Drawing Rights[296] (SDR)150,000] and above. This was considered too high, with the effect of excluding a significant portion of members' procurement with a value below that amount. Another limitation of this agreement is that it applied only to purchases by central-government controlled purchasing agencies. It excluded state and local government's purchases. It thus

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[291] *Ibid.,* Art. II,

[292] See generally Hornbeck, S. K.,*The Most-Favoured-Nation Clause (German-American most-favored-nation relations: arguments against and for the use of the clause: suggestions)* AJIL Vol. 3, No. 4 (Oct., 1909), pp. 797-827..

[293] GPA 1979, Art. III

[294] Pomeranz, M.,*Toward a New International Order in Government Procurement,* 11 Law & Pol'y Int'l Bus. (1979) 1263.

[295] The Agreement however covered *"services incidental to the supply of products if the value of these incidental services does not exceed that of the products themselves, but not service contracts per se."* See Art. 1(a).

[296] SDR refers to a figure agreed and fixed to a US Dollar equivalent, and then converted on annual basis into the currencies of all Parties to the GPA. This is used as basis for calculating the value of contracts for the purpose of determining if a particular contract is to be covered by the Agreement or not. There was a controversy as to whether this calculation should include value added tax (VAT) on the amount of the value of the contract, or not. On this the GATT Panel on Value-Added Tax and Threshold considered "the silence of the Agreement and the absence of a negotiating history concerning this term," and found that VAT should be included as part of the overall cost a procuring entity has to bear. See *Report of the Panel on Value-Added Tax and Threshold,* adopted by the *Committee on Government Procurement* on 16 May 1984 (GPR/21 - 31S/247), paras. 18-28.

provided under Art. IX:6(b) for the Parties to "undertake further negotiations, with a view to broadening and improving this agreement on the bases of mutual reciprocity". [297]

The negotiations for the review of the 1979 Agreement were conducted at two different stages. The first stage was initiated in 1983, and the new Agreement entered into force in 1988. This revision extended coverage to rental and leasing contracts.[298] The second revision, which a major one too[299] was launched during the Uruguay Round negotiations. This revision was aimed primarily at "elimination of discriminatory measures and practices which distort open procurement practices".[300] It also sought to expand the scope and coverage of the GPA and thereby generally strengthening it inter alia, by way of increasing the number of entities covered by the agreement and expanding the coverage to include services contracts. There was also the desire to improve the enforcement mechanisms of the agreement by means of a bid challenge or compliance provision. Bid challenge provisions would allow an aggrieved supplier to challenge the decision or award of a contracting authority before domestic court or a specialised dispute settlement body. Compliance provisions would ensure that an entity complies with an award issued against it in event of a dispute. Finally, the revision was to "promote expanded

[297] See, UNCTAD, *Dispute Settlement course materials* (2003), *supra,* n. 269. Bilateral reciprocal negotiation could indeed entail more commitments than the minimum provided in the GPA. For instance, as between Jordan and Singapore, the bilateral agreement includes more obligations than the GPA, in the area of goods and services procurement, as the two countries lowered the application threshold for GPA from 130,000 SDR to 100,000 SDR. *See.* www.kantei.go.jp/foreign/procurement/2004/ch/FY2004ch3e.pdf (accessed 25/12/08).

[298] *Ibid.*

[299] This revision was described as 10-fold improvement on the earlier code in terms of coverage and the *extension* of international competition to include national and local government entities. See WTO, *Government procurement: opening up for competition,* at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm#govt (accessed 25/12/08) See also Earley, J., *Green Procurement in Trade Policy,* Background report prepared for The Commission for Environmental Cooperation (CEC) undated, available at: http://www.cec.org/files/PDF/ECONOMY/green-procurement-in-trade%20Policy_en.pdf (accessed 19/06/08).

[300] Federal Register / Vol. 64, No. 91 / Wednesday, May 12, 1999 / Notices, p. 25528. Other objectives of the revision include the "[s]implification and improvement of the GPA, including, where appropriate, adaptation to advances in the area of information technology and streamlined procurement methods".

membership of the GPA by making the Agreement more accessible to non-members"[301] especially from developing countries and thus make it a genuine multilateral agreement.[302]

The revision was a modest success, as improvements were achieved in most of the areas highlighted above.[303] That is to say it achieved enlargement of the coverage of entities to include sub-central and quasi-governmental bodies, and to cover procurement of telecommunications, electrical and transportation equipment. In the same vein, coverage was also enlarged to include procurement of government purchases of services. The threshold was also decreased from SDR150,000 to SDR130,000 to allow for more contracts to be eligible for the Agreements application. More work, however, was needed to attract more members from the developing countries, which still is the situation. The result of this review was the conclusion of the WTO GPA of 1994 which came into force in 1996.

3.4 The WTO GPA: An overview

This section gives an overview of the GPA. It discusses the key provisions of the GPA especially as they relate to the non-discrimination obligations that have been the subject of the exceptions under GATT Art. III:8(a) and Art. XVII:2. The WTO GPA resulted from the second review of the 1979 Code mentioned earlier. It was one of the two *Plurilateral* Agreements attached in Annex 4 to the WTO Treaty signed on 15 April 1994.[304] The objective of the GPA 1994 as stated in its Preamble,

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[301] *Ibid.*

[302] *Ibid.*

[303] See Hoekman, B. M., and Mavroidis, P. C., *supra,* n. 264, p. 1 of the summary.

[304] See WTO GPA, *supra,* notes 4–5. The text of the GPA is available at: http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm (last visited 09/09/10). GPA Parties (as of July 15, 2009 the date Chinese Taipei joined) are only 14 out of the 153 WTO Members (counting the European Communities (EC) and the 27 EU Member States as one Party). They are: Canada, Japan, EC [Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Bulgaria, Romania], Hong Kong China, Chinese Taipei, Iceland, Israel, Korea, Liechtenstein Netherlands with respect to Aruba, Norway, Singapore,

is to provide an effective and transparent multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade.[305] GPA is regarded as the most important of the plurilateral agreements, inter alia, "because of its very substantial coverage, [and] because it takes trade liberalization into an important area which was specifically excluded from the coverage of the GATT".[306]

The GPA applies only to procurement "covered" by the agreement. "Coverage" is determined by three factors, thus: (1) whether the particular government entity responsible for the procurement is included in the list provided by the Party's schedule to the agreement;[307] (2) whether the procurement contract is for goods, services or construction works, and (3) whether the value of the particular procurement is above the "threshold" agreed under the Agreement, as provided by each Party in its schedule.[308] In this regard, in order to ascertain if a particular procurement contract is covered by the GPA, Parties "check not only whether the procuring entity in covered, but also the threshold level, and if the contract is for service, whether that service is covered. Parties therefore are expected to check the *General Notes* at the end of most Parties' schedules which usually provide for a

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Switzerland, and the United States. For up-to-date listing see http://www.wto.int/english/tratop_e/gproc_e/memobs_e.htm (last visited: 06/09/10).

[305] See generally, Trepte, P., *The Agreement on Government Procurement,* in Patrick F. J. Macrory (et. el.) (eds.), The World Trade Organization: Legal, Economic and Political Analysis, (Vol. 1) (Springer Science+Business Media, Inc., New York, USA, 2005), pp. 1123-1164.

[306] Croome, J., Guide to the Uruguay Round Agreements (WTO Secretariat, Geneva), (Kluwer law International, 1996), pp. 247-248.

[307] See *supra,* Section 3.2.2.

[308] For each of the Annexes under Appendix I, there is relevant thresholds are specified. See GPA Art. I:1 (footnote 1) and Art. I:4. See also GPA Art. XIX:5 on members' obligations in respect of *Information and Review as Regards Obligations of Parties* including setting and calculating threshold levels.

number of exceptions."[309] Thus, the rights and obligations created under the GPA are observed by the parties on a reciprocal basis as with commitments specified in the schedules, rather than on strict MFN basis.[310]

3.4.1 The key disciplines of the GPA 1994

Pursuant to its stated objectives, the GPA requires that non-discrimination as well as transparency should be the basis of the laws, procedures and practices concerning government procurement of the Parties. As this agreement is the focus of this study, it is pertinent to highlight some of its basic features and disciplines that have direct bearing on the research question. These are (a) non-discrimination, (b) transparency and (c) the rules on technical specifications.

3.4.1.1 National Treatment and Non-Discrimination

Non-discrimination obligation, as encapsulated in the NT and MFN, is the cornerstone of the WTO Multilateral Trading System.[311] The text of the GPA. Art. III entitled *"National treatment and Non discrimination*,"[312] states:

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[309] WTO, *Overview of the Agreement on Government Procurement,* available at http://www.wto-org/english/tratope/gproce/overe.htm (last visited 28/11/08)

[310] See Van Calster, G., *supra,* n. 38, p. 298: "parties only have to extend the duties laid upon them as a result of their adherence to the AGP to those members who are also a party to the agreement." See also Kunzlik, P., *International Procurement Regimes, supra,* n. 170, p. 107.

[311] This has been repeatedly asserted by the AB in various rulings. See for instance, AB in *Canada – Autos*, para. 69. In *EC – Tariff Preferences (ABR),* the AB in para. 101 (footnote 215) quoted its earlier description of MFN in *US – Section 211 Appropriations Act*, para. 297, thus:

> Like the national treatment obligation, the obligation to provide most favoured- nation treatment has long been one of the cornerstones of the world trading system. For more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods.

[312] The style adopted in the title of this Article: "national treatment and non-discrimination", is rather strange. This is because the non discrimination norm of the WTO system consists of the two pillars of "national treatment" and "most favoured nation treatment". This title thus could be read to mean that national treatment is different from, or outside of the meaning of *non-discrimination.* This style does not reflect the practice in the other WTO Agreements including the GATT and GATS where no such title has been used. Indeed in the GATT and GATS, for instance, the two pillars are addressed in different articles. The use of this style started right from the preparation of the initial draft GPA which was to become the 1979 Tokyo Procurement Code which pioneered the regulation of GP in the MTS. See GATT, *Group "Non-Tariff Measures" Sub-Group on "Government Procurement" Agreement on Government Procurement* (MTN /NTM/W/211), 19 December 1978. This style was however not used in the OECD draft guidelines which served as the working document for the said Sub-Group on GP. Incidentally, NAFTA Chapter 10, Article 1003 also used the same style. See NAFTA Agreement between United States

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and *unconditionally*[313] to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:

   (a) that accorded to domestic products, services and suppliers; and

   (b) that accorded to products, services and suppliers of any other Party.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:

   (a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and

   (b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

The two arms of the *non-discrimination* obligation (MFN and NT) ensure that national policies including those related to environmental protection do not arbitrarily discriminate between foreign and domestically made products, or between products imported from different trading partners. These provisions are a reflection of the GATT Arts. III and I related to goods and Arts. II and XVII of the GATS on services.[314] These provisions in GATT and GATS deal with differences in treatment resulting from regulatory distinctions made by governments, whether these

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of America, Canada and Mexico, came into force in 1994. See the Agreement and other legal texts at http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=267 (last visited: 08/07/09).

[313] [Emphasis added] See 3.4.1.1.para. (b)

[314] Trepte, P., *supra,* n. 172, p. 130

distinctions are made "explicitly with respect to the origin of the product, or with respect to manifestly different products."[315]

a) The MFN

The MFN obligation is incorporated in the GPA Art. III:1 above. While the NT principle prohibits discrimination against foreign products, MFN prohibits discrimination between the GPA Parties. Looking at from the GATT persepective, it means where countries X, Y and Z are all members of the GATT, then any trade advantage that X grants to Y should also be extended to Z regardless of the relationship between Y and Z, and also regardless of whether Y actually made some reciprocal commitments to X which Z is not capable of doing to X. The same applies the other way round. Mitsushita states that MFN was conceived in the GATT as "a carrot to attract members in the institution".[316] As members are obliged to offer to outsiders "advantages that were not immediately granted to members of the club, countries knew that adherence to the GATT *ipso facto* meant access to an ever growing number of markets under most favoured terms."[317] Thus, entitlement to the MFN imposes on the Member the duty to observe other GATT obligations, which may entail restrictions on the Members domestic regulatory authority. It is therefore a give-and-take situation, applying only to the Members of the club.

b) The "*unconditional*" observance of MFN obligation

An important feature of the MFN obligation is that it should be performed *unconditionally*. MFN in its ordinary sense would mean that "any concession negotiated with a single trading partner or group of trading partners must be extended without condition to all other trading nations."[318] Hence, the GPA Article

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[315] *See United States - Taxes On Automobiles DS31/R, 11* October 1994 Report of the Panel [hereinafter, "*US – Autos (*Panel)"], para. 5.5.

[316] Matsushita, M., Schoenbaum, T. J. and Mavroidis, P. C., *supra,* n. 189, p. 234

[317] *Ibid.*

[318] See Schwartz, W. and Sykes, A. O., *The economics of the most favoured nation clause*, in Bhandari, J. S. and Sykes, A. O. (Eds.), Economic dimensions in international law –Comparative and empirical perspectives, (Cambridge University Press, Cambridge, UK, 1997), pp. 43-79 at 59.

III:1(b), following the style of the GATT Art. I, obliges the Parties to "immediately and unconditionally" treat the products, services or suppliers of services of all Parties equally in the business of government procurement.

It is believed by commentators that the *Belgian Family Allowances* dispute is "the fountainhead for a strict interpretation of the unconditional MFN requirement in GATT Article I".[319] In that case, certain Belgian legislation[320] placed certain internal *ad valorem* percentage of tax on the price of imported products if these were purchased by government bodies, for governmental functions (GP). The tax is used to finance "Family Allowances" (*Allocations Familiales*), a Belgian government social security programme. This tax however, is waived for products emanating from countries that have in place a social programme similar to the *Belgian Allocations Familiales.* Thus, the exemption ("favour") here which should be granted on an MFN basis to all GATT (WTO) Members, "unconditionally" is now made *conditional* by Belgium. Certain countries[321] satisfied this condition, and thus qualified for the exemption. Others including Norway and Denmark (the complainants in this dispute), did not according to the Belgian Law, qualify for the exemption. The Panel held, inter alia, that the Belgian legislation was inconsistent with the GATT Art. I since it introduced discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions.[322] On this, Hudec

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[319] Charnovitz, S, *Supra,* n. 272.

[320] *The Royal Decree of 19 December 1939,* Articles 130-132, reprinted in Part in BISD 1st Supp. (1952), p. 62. [Extracts annexed to the Panel Report, available at: http://www.worldtradelaw.net/reports/gattPanels/belgianfamilyallowances.pdf (last accessed: 01/08/09)]. See generally, Hudec, R. E., [Chapter 13 (135-157)], *supra,* n. 274.

[321] France, Italy, the Netherlands, Luxembourg, and the UK.

[322] *Belgian - F*amily *Allowances* supra n. 273, Para 3. The Panel also advised (para. 8) that generally, the whole Belgian legislation on family allowances was "not only inconsistent with the provisions of Article I … but was based on a concept which was difficult to reconcile with the spirit of the General Agreement." For more analysis of the legal implications on the ruling, see Charnovitz, S., *supra,* n. 272.

added that this was exactly the kind of "condition" the MFN clause "unconditionally" sought to eliminate.[323]

However, in GPA, as in other plurilateral agreements, observance of MFN "unconditionally" seems technically problematic. Indeed, even Jackson and Hudec alluded to the fact that by their very nature plurilateral agreements could be antithetical to the MFN principle of the GATT system.[324] This is because obligations of the Parties to the GPA are closely related to the coverage issue mentioned earlier. GPA Parties are bound to observe the non-discrimination obligations towards other Parties only to the extent that the other Parties also reciprocate with the same level of commitments.[325] These commitments are determinable by what the Parties specify in their schedules.

Thus under GPA, following the earlier example of XYZ above, the problem is how can GPA Party X confers MFN advantage to Z to the level it has conferred to Y where Z has less entities or sectors included in its schedules than Y's commitments. In other words, MFN obligation is only required to be observed between Parties that have mutually and comparably reciprocated their commitments to others.[326] This has resulted in Parties engaging in cross bilateral negotiations and exchange of schedules of commitments. In this case a party would only provide concessions to another party which also offers equivalent concessions. Example is how the EC withheld MFN concession to Canada and Japan in respect of some sectors or

[323] See Hudec, *supra,* n. 274, p. 136.

[324] See Hudec, R., *Comments and Discussion* on Jackson, H., *The Role and Effectiveness of the WTO Dispute Settlement Mechanism,* Brookings Trade Forum: 2000, pp 179-236, at p. 230. Hudec stated that the initial idea of plurilateral agreements was for the larger countries in the GATT to use them to obtain the signatures of some of the more important developing countries, to reach a consensus to enable adopting reports of dispute settlement Panel reports. He stated that the US even announced that non-signatories would not be accorded the new and more expansive legal rights created by these agreements— [which position was] a flat violation of GATT's 'unconditional' most favoured nation (MFN) obligation."

[325] Arrowsmith, S., *supra,* n. 51, p. 796.

[326] *Ibid.*

utilities as covered by its Annex (e.g. its water sector) because these countries have not made similar concessions in the same sectors.[327] To this extent, then, the application of MFN obligation as it is known in trade law and policy is restricted under the GPA.[328] As Wang puts it, "GPA does not restrict parties' discretion to make various types of party-specific derogations departing from MFN".[329]Thus, it may be safe to say that *unconditional* observance of MFN under the GPA would mean rendering equal treatment towards all Parties who have made comparable reciprocal concessions in their schedules.

One of the problems associated with the requirement that MFN should be observed "unconditionally" is "free-riding". This question has attracted a lot of interest among commentators.[330] This signifies a situation where non-Parties to a plurilateral agreement like GPA are entitled to the advantage of market access provided by Parties to other Parties under the general GATT MFN basis. This issue, which used to affect all the other Tokyo Round Codes until they were multilateralised, has not been resolved in the respect of the GP which still remains as plurilateral. The practical question is could developing countries (non-GPA members) be entitled to the GATT unconditional MFN in procurement-related comitments. This question would probably be answered with reference to the GPA provisions on differential and more favourable treatment to be given to developing countries in procurement process. The apparent answer should be that any developing countries wishing to enjoy an MFN privilege in the procurement sector should first sign up to the GPA. It can then negotiate schedules with the bigger developed countries that would offer

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[327] See Wang, P. *supra,* n. 195, at p. 8.

[328] *Ibid.*

[329] *Ibid.*, p. 7.

[330] See Schwartz, W. and Sykes, A. O., *supra,* n. 322, pp. 59-63.

concessions without asking for reciprocal commitments from the developing countries. Going into details on this issue is outside the purview of this study.

c) National Treatment

The NT obligation "imposes an obligation of like treatment and non discrimination between domestic and imported goods."[331] This obligation becomes due as soon as imported goods have cleared the customs procedures and formalities.[332] That is to say, in simple terms, once goods have entered a market, they must be treated no less favourably than like domestically produced goods.[333] The essence of this obligation in trade policy as stated by the Panel in the *US – Superfund*, referring to GATT Art. III:2 is, inter alia, that "it protects [the WTO Members'] expectations on the competitive relationship between imported and domestic products."[334]

This principle as contained in GPA Art. III:2 above thus requires GPA Parties to refrain from subjecting products, services and suppliers of other parties to the agreement to a treatment "less favourable" than that given to their domestic products, services and suppliers. Furthermore, each Party is required to ensure that its entities do not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership and do not discriminate against a locally established supplier on the basis of country of production of the good or service being supplied.[335]

Thus to the extent that GPP from Kyoto Parties with high emissions reduction commitment discriminates between products or services or suppliers of services

[331] See Matsushita, M., Schoenbaum, T. J. and Mavroidis, P. C., *supra,* n. 188, p. 234.

[332] *Ibid.*

[333] See, WTO, "GATT 1994 — Arts. I and III on Non-Discrimination" at http://www.wto.org/english/tratop_e/envir_e/issu3_e.htm#nondiscrimination

[334] *US – Superfund* (Panel), paras. 5.1.9 and 5.2.2. *supra,* n. 31.

[335] GPA Art. III:2

based on energy-saving criterion, and this results in disproportionate impact on foreign products, services or suppliers of services, this may raise issues with the national treatment obligation against the said Kyoto Parties. It may even be seen as a disguised protectionism in favour domestic renewable energy production industry of the Kyoto Parties.

d) The National Treatment obligation and the *"Like" products* question

It is to be noted here that while the GATT Article III on national treatment used the term "like", the GPA has avoided that term. And, since GATT Art. III is not applicable to GP the question is to what extent will this disparity in the text affect the meaning of the text or the effectiveness of its application? The essence of the term "like" in the GATT version of the NT obligation is to provide a basis of comparison between the foreign product that has allegedly suffered less favourable treatment as against the domestic similar product. The term "like" therefore is central to the determination of the discrimination prohibited by the WTO system. Could the term "like" therefore be assumed to be in the GPA text by default?

As this study centres on discrimination between products and services and suppliers of services, based on environmental criteria, determination of likeness of environmental goods and services is therefore also essential. Indeed "likeness" of products based on an environmental criterion is at the heart of the trade environment debate which addresses the interactions between trade regulation and national environmental policy.[336] In other words if products are "like," but are differentiated based on the manner they are produced (PPMs), in this case their energy efficiency characteristics, could procurement authorities legally give preference to the more energy-efficeint products over others with less efficient

[336] Bernasconi-Osterwalder, N., (et al), Environment and Trade: A Guide to WTO Jurisprudence (Earthscan Ltd, London, UK, 2005), 8.

PPMs? This aspect of the study is explored in detail in chapter 6[337] where the issues of GPP, product standards and related issue of PPMs are discussed.

3.4.1.2 Transparency in government procurementunder the GPA

(a) Transparency and government procurement

Transparency is a difficult concept to define. It broadly means "openness".[338] It is the legal requirement on the public authority to ensure not only the publication, notification, and dissemination of information about procurement procedures, but also doing these on an equal and non-discriminatory basis towards all prospective bidders.[339] Transparency thus enhances predictability of the process, and facilitates equal treatment to all prospective tenderers, at all stages of procurement processes. Underscoring the significance of transparency in international trade, Arrowsmith stated that "[I]n all markets, lack of transparency in the sense of absence of information on rules and practices, operates as a distinct barrier to trade, and often affects foreign suppliers disproportionately."[340] Hence, the GPA, GATT and many other WTO agreements contain obligations to deal with the need for Parties to be transparent in their trade laws, policies and practices.[341]

Transparency in GP has been one of the work areas of the WTO system. In 1996, at the Singapore Ministerial Conference, a Working Group on Transparency in

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[337] See *infra*, Chapter 6, section 6.4. and 6.5. Other relevant questions addressed in Chapters 6 included: To what extent are non-product related PPMs relevant in determining the likeness or otherwise of products and services?.

[338] *Ibid*. For multilateral corporations like the International Finance Corporation (IFC) of the WB, transparency is one of the core pillars of *Disclosure Policy Review* process. IFC defines *transparency* as "the entity's degree of openness with respect to access to and provision of information". See Almona, C., http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Summaries/$FILE/SUMMARIES++OF+THE+WEEKLY+DISCUSSIONS.pdf (last accessed 10/10/08).

[339] For an in-depth treatment of the concept of transparency in international economic law generally, see Zoellner, C., *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law (Student Note), Michigan Journal of International Law* Vol. 27: [Winter 2006], pp. 579-628.

[340] Arrowsmith, S., *Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organization*, Journal of World Trade 37(2): 2003 (283–303), at p. 294.

[341] For example, GATT (Art. X) and GATS (Art. III.1) require states to publish general measures affecting trade. Similarly, GATS and the TBT Agreement require states to set up enquiry points.

Government Procurement was set up "to conduct a study on transparency in government procurement practices, taking into account national policies and, on that basis, to develop elements suitable for inclusion in an appropriate agreement".[342] Although this process for developing a multilateral agreement on transparency in government procurement has been suspended,[343] this decision nevertheless, underscores the importance of establishing transparency discipline in the conduct of government purchases.

Indeed, transparency can be valuable also in increasing opportunities for competition, which in turn can stimulate innovation between and among suppliers to the government.[344] Where more bidders are encouraged by a transparent procurement system, to participate, this widens the market and makes competition more acute. In the end, the situation benefits more innovative bidders. This element of "innovation," is also one of the driving forces for climate-friendly procurement policies of the Kyoto Protocol signatories.[345] In the same vein, transparency which engenders real competition between different bidders forces prices down to secure the best value for tax- payers' money, which is a duty on public authorities.[346] Similarly transparency promotes openness which in turn encourages foreign business to participate in the domestic procurement biddings. This can increase possibilities and market access through partnering between local and foreign bidders, as they (foreign business) establish "commercial presence" and the

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[342] See WTO, *Singapore Ministerial Declaration*, adopted on 13 December 1996 (WT/MIN(96)/DEC, 18 December 1996), paragraphs 21-22.

[343] See WTO, *July Decision,* of the General Council, paragraph 1(g) adopted on 1 August 2004 (WT/L/579, 2 August 2004), available at: http://www.wto.org/english/tratop_e/gproc_e/gpmand_e.htm#jd (last visited 10/01/09).

[344] See *Beyond the WTO Round: Greater transparency in government procurement* available at: http://trade-info.cec.eu.int/doclib/html/123509.htm and http://europa.eu.int/comm/trade/icentre/opportunities/index_en.htm

[345] See *infra,* Chapter 5.

[346] See *supra,* Section 2.1

opening of local branches in the domestic commercial environment of the foreign markets.

Another important objective of transparency discipline in procurement is it helps in fighting bribery and corruption which is the bane of procurement practices. This is more the case with the developing world where procurement regimes are still not mature. A transparent set of rules makes it difficult for a contracting entity to demand or receive bribes and helps establish a level playing field. Arrowsmith puts it rather differently, saying that transparency provides for "a rule-based system that limits the discretion of procuring entities".[347] An unfettered discretion on the part of the procuring authority is a gate way to corruption in the system.

(b) Transparency requirements under the GPA

At the outset, the Preamble to the GPA recognises that "it is desirable to provide transparency of the laws, regulations, procedures and practices regarding government procurement".[348] The GPA provisions on transparency are therefore aimed at facilitating and complementing the observance of the GPA basic disciplines of national treatment and non-discrimination.[349] The provisions relate to (1) the requirement for publishing of procurement notices, and (2) the openness of tendering procedures.

(i) Publishing of procurement notice:

The GPA requires that invitations to tender and the notice of award results be published.[350] This requirement is aimed at putting the public to notice of both the invitation to tender, which gives equal opportunity for companies or firms to express

[347] See Arrowsmith, *supra,* n. 51 at p. 170.

[348] See the Preamble to the GPA, GPA, *supra,* n. 4.

[349] Arrowsmith, S., *supra,* n. 51, pp. 168-169; Also a definition of transparency, offered by Steven Schooner emphasises the connection between open procurement procedures as between the "offerers and the contractors", and the need to "ensure that government business is conducted in an impartial and open manner." See Schooner, S. L., *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103, 105 (2002), cited by Zoellner, C., *supra,* n. 343, at p. 6.

[350] GPA Art. XVII:1

interest to participate or to tender for the goods or services required. The GPA similarly requires the publishing of any domestic law, regulation, judicial decision, administrative ruling and any procedure of the contracts in which the result of the tendering process appear.[351] This requirement is aimed inter alia at putting to notice the prospective participants, including foreign suppliers, as to the local legal and policy environment under which they would operate. It informs them of their rights as well as responsibilities in the procurement process. It thus prepares them on an equal footing, so that no surprises are sprung against any participating firm.

(ii) Tendering

The GPA Arts. VII – XVI provide for three types of tendering procedures: open, selective, and limited.[352] *Open* procedure allows all interested suppliers located at home or abroad, to submit tender or bid. *Selective* procedure allows only those suppliers invited to do so, or pre-qualified firms, to submit a tender. Pre-qualification is an additional step where a firm must demonstrate its ability to supply goods in the manner and time, and of the quality specified in the notice. In this regard, GPA Art. VIII emphasises that "any conditions for participation in tendering procedures shall be limited to those that are essential to ensure the firm's capability to fulfil the contract and shall not have discriminatory effect."[353] Thus, pursuant to Art. X:3 in order to afford more opportunity for maximum participation of more firms, *non-qualified* suppliers requesting to participate may also be included where there is adequate time to complete the qualification procedure in accordance with Arts. VIII to IX.

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[351] *Ibid.* Art. XIX:1.

[352] *Competitive Dialogue* is another procedure, but not covered by the GPA. It is a feature of the EU procurement system. It has been introduced to complement the existing open, restricted and negotiated procedures. It is intended to be used for large complex projects in circumstances where other procedures are not workable, remains unchanged. This procedure is used for particularly complex contracts where use of the open or restricted procedures will not allow the award of the contract. See Art. 29 (1).

[353] GPA Art. VII (a) and (b)

In *Limited* procedure, on the other hand, the contracting authority here contacts suppliers individually. The Agreement allows this deviation from the general principles governing tendering, in accordance with Art. XV, in specified instances. These circumstances include where there were no tenders in response to an open or selective invitation, or collusive tenders submitted,[354] or extreme urgency, or from suppliers who do not comply with the conditions of participation provided for in accordance with the GPA.[355]

From the foregoing, it can be deduced that the "Open" procedure is the most transparent method which opens up the opportunity for international bidding with no limitations on the number of potential bidders. Selective procedure is permitted where it is not feasible or efficient to consider and evaluate a large number of potential bids, as long as all potentially interested suppliers are given the same opportunity to access information on procurement and to seek to be invited to bid.[356] On the other hand, the object of limited tendering which potentially "frustrates one of the principal objectives of procurement reform—namely, to stimulate competition among suppliers,"[357] is adopted as a necessary fall-back to address the situations stated in these paragraphs. There is of course the potential for abuse of the limited tendering method being used with a view to restrict wider participation.

GPP processes should observe the above transparency disciplines. Chapter 5 which discusses in detail the GPP process indicates that where procurement entities intend to incorporate environmental considerations in their process, then

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[354] "Collusion" is described as an "*explicit agreements* between competing firms in the same market on how they will bid for one or more projects." See Zarkada-Frase et al, '*Decisions with Moral Content: Collusion'*, Construction Management and Economics, 18:1, 101 – 111, p. 102.

[355] There are other instances which may warrant the use of limited procedure. These are listed in paras. (b) to (j) of Art. XV.

[356] UNCTAD/WTO at: http://www.jurisint.org/pub/06/en/doc/C24.pdf

[357] See the Summary of Evenett, S. J., *supra,* n. 206, p. 9.

they should do that in a transparent manner. These considerations should be reflected in all the stages in the procurement process where suppliers would be required to supply the "green" goods and services. Failure to make explicit such information may render the process invalid.

3.4.1.3 Technical specifications of products/services or suppliers[358]

Technical specifications define the characteristics of a product or material, including "levels of quality, performance, safety and dimensions."[359] They normally set "the minimum quality standard acceptable for performance of the contract."[360] Technical specifications may also "lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services."[361]

One of the concerns in this regard is the potential of using technical standard setting for products and services to be procured, for disguised or de-facto discrimination where compliance is made easier for the domestic than foreign firms. This is possible, where, for instance, pursuant to an internal government policy, the procuring authority inserts strict environment-related technical specification for the goods/services to be procured, and compliance with which the domestic firms found easier.

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[358] Chapter 6 of this research analyses these general conditions for use of technical specifications and the scope for procurement entities to incorporate environmental considerations as part of the technical specifications. Thus, here is only a highlight of the GPA provisions related to the issue of technical specifications. In so doing the Chapter addresses the complexities associated with the relevance of TBT and SPS agreements on the issue of standards

[359] GPA Art. VI:1. See also *TI procurement manual Section H: guide to the European Union services directive & WTO, government procurement agreement (GPA)*, available at the DTI website: http://www.dti.gov.uk/about/procurement/buyers-guides/page22752.html (last visited: 21/0608).

[360] See "UK Government Timber Procurement Policy": Timber Procurement Advice Note November 2005 available from the CPET website www.proforest.net/cpet

[361] *Directive 2004/18/EC Of The European Parliament and of the Council* of 31 March 2004 *on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, in Official Journal of the European Union (30.4.2004)* available at: www.simap.europa.eu/shared/docs/simap/nomenclature/32004L18EN.pdf – (last visited 21/05/10). See Section 9 for discussions on environmental specifications of the product in procurement process.

Under the GPA, technical specifications inserted in the tender notice should relate to the "performance rather than design or descriptive characteristics" of the products or services, and should "be based on *international standards* where such exist, otherwise on *national technical regulations*, recognised national standards, or building codes."[362] These terms in italics are defined under the GPA to include "related processes and production methods."[363] It is however still "uncertain" whether this provision "either negates, or on the contrary, enforces the conclusion, that non-product-related PPMs are within the limits of Art. VI(1) of the GPA"[364] The implication of this express mention of related PPMs may also be seen in its potential to suggest that environmental protection (for example, climate change mitigation) and energy security-motivated technical standards for products may not be justified where such measures result in differential treatment given to otherwise "like products" based on non-product-related PPMs.

Thus, a GPA party embarking on GPP has the challenge to prove that the technical specifications it inserted in the tender documents relate to the *performance* of the product rather than descriptive design, or physical characteristics. Hence, such a Party will have difficulty showing how a fossil-fuel based electricity performs below or less qualitative than green one. In the EU, however, as seen earlier, the law has taken care of this problem, namely, for climate change concerns entities are required to give preference to green electricity over fossil-fuel based electricity. So it is not discriminatory under the law to enage in green energy procurement. All the defendant needs to do is to establish that the green electricity performs differently from the conventional electricity as this serves the climate change and energy

[362] GPA Art. VI:2.

[363] See for instance the definition provided under Footnote 3 to GPA Art. VI.

[364] See Van Calster, G., *supra,* n. 38, p. 302.

efficiency purpose of the EU law, hence warrants the differentiated treatment. If this cannot be demonstrated in a GPP challenge, then green energy procurement is simply discriminatory and protectionist. Thus under the GPA, the defendant has more difficulty to prove its GPP poly than under the EU system. Under the GPA, the fall-back is the Art. XXIII on general exceptions.

3.4.2 The general exceptions

GPA Art. XIII provides for general exceptions to the non-discrimination rules.[365] This Article essentially is a reproduction of the GATT Arts. XX and XXI. The exceptions legalise a measure otherwise inconsistent with the GPA where it is applied "to protect … human, animal or plant life or health."[366] There are certain conditions specified in the Article to be fulfilled. The jurisprudence under GATT Art. XX indicates that the Party invoking an exception must first prove the measure as being covered by the exceptions. This will require the proof of the "necessity" of the measure. Then the *chapeau,* or introductory part of the Article, engages the Party to prove further that such a measure is maintained in a non-discriminatory manner as between all the GPA Parties, and does not amount to an unnecessary obstacle to international trade. In other words, it should not amount to protectionism in disguise.

The significance of these exceptions to this study must not be overstated. The central argument for GPP hinges on these exceptions which are seen as providing the GPA Parties with the needed legal policy space to maintain GPP. However, the research goes beyond the consideration of climate-friendly procurement as justifiable pursuant to the UNFCCC/KP. It looks more at the critical nature of climate change, and suggests that it deserves a treatment outside the exceptions in the trade rules.

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[365] This subject is treated in detail, generally, in Chapters in Part 7, *infra,*.

[366] Other aspects covered in that Article: or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour. However, the exceptions relating to procurement measures that affect "essential security interests" of the State are provided for under paragraph 1 of the same article.

3.5 GP under multilateral institutions: *UN and the WB*

It should be noted that in addition to the processes undertaken under the auspices of the GATT/WTO system, procurement reform initiatives have also been taking place in other multilateral fora, which may also impact on the operation of the GPA. For instance, procurement guidelines were also prepared under the auspices of the United Nations system, the UNCITRAL[367] Model Procurement Law,[368] as well as by the World Bank.[369] Similarly, the Asian Development Bank/OECD (ADB/OECD) Anti-Corruption Initiative for Asia and the Pacific included guidelines for reform in the GP sector of the member countries.[370] These initiatives have played important complementary roles in the efforts to properly regulate procurement practices generally. These multilateral rules and guidelines on procurement share many similarities, on all the major procurement disciplines, with the rules formulated under the GATT/WTO system. For example, in relation to supplier qualifications, the UNCITRAL Model Law lists a range of criteria that procuring entities may require the suppliers to meet in order to qualify for participation in procurement process.[371] Similarly, the World Bank Guidelines stipulate that the qualification criteria should be

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[367] UNCITRAL, the *United Nations Commission on International Trade Law* established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966 "to promote the progressive harmonization and unification of international trade law.

[368] *The 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (revised in 2007*, revised version not currently in force) was launched at the UNCITRAL's 19th Session, in 1986. The Model Law and its accompanying Guide to Enactment were adopted by the Commission at its 26th session (Vienna, 5-23 July 1993) (See Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17))(hereinafter "the UNCITRAL Model Procurement Law"). For an analysis of the efforts to bring municipal procurement institutions up to international standards through the WTO GPA and the UNCITRAL Model Procurement Law, and the relationship between the two systems, see Linarelli, J., *The WTO Agreement on Government Procurement and the UNCITRALModel Procurement Law: A View from outside the Region,* in Asian Journal of WTO and International Health Law and Policy (AJWH) VOL. 1:317.. (61-84).

[369] See the *Guidelines Procurement under IBRD Loans and IDA Credits of May 2004* (Revised October 1, 2006 and May 1, 2010), (the WB, Washington, D. C., USA, 2006) (Hereinafter "WB procurement guidelines"), available at: http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~pagePK:84269~piPK:60001558~theSitePK:84266,00.html (last visited: 13/06/10).

[370] ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, *Reform of procurement policies and practices since the adoption of the Thematic Review on Curbing Corruption in Public Procurement (May 2006)* available at: www.oecd.org/corruption/asiapacific (accessed 20/12/08).

[371] See *UNCITRAL Model Procurement Law*, *supra,* n. 368, Arts 6 – 8.

geared towards establishing the capability and resources of the supplier to perform, in relation to the requirements of the contract.[372] These guidelines, generally, conform to those stipulated in the GPA on supplier qualifications (Art. VIII).

In relation to procurement of goods and equipment, the WB Guidelines also list other factors that could be taken into account. These include "payment schedule, delivery time, operating costs, efficiency and compatibility of the equipment, availability of service and spare parts, and related training, safety, and environmental benefits".[373]

According to the enactment guide, the UNCITRAL Model Procurement Law was intended to serve as a model for States for the evaluation and modernization of their procurement laws and practices. [374] It is thus a non-binding recommendation of best practices.[375] The model law aims to foster and encourage "participation in procurement proceedings by suppliers and contractors … regardless of nationality, and thereby promoting international trade"[376] The WB Procurement Guidelines, on the other hand, apply to procurement of goods, works, and services required for projects "financed in whole or in part by a loan from the International Bank for Reconstruction and Development (IBRD) or a credit or grant from the International Development Association (IDA)."[377] While the Loan Agreement itself regulates the relationships between the borrower country and the Bank, the Guidelines apply to

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[372] See *WB Procurement Guidelines, supra,* n. 369, paras. 1.6, 1.7, 2.9, 2.10, and 2.58. For more comparison and analysis on the three international procurement systems see WTO, *Work of the Working Group on the Matters Related to Items VI-XII of the List of the Issues Raised and Points Made, (*Note by the Secretariat) WT/WGTGP/W/33 3 October 2002. See also a comparison between GPA and UNCITRAL, Linarelli, J., *supra,* n. 343.

[373] *WB Procurement Guidelines*, *Ibid.*, para. 2.59.

[374] So far, about 20 countries, most of whom are from the developing world, have modelled their procurement legislation along the Model law. These countries including: Afghanistan (2006), Albania, Azerbaijan, Croatia, Estonia, Gambia (2001), Kazakhstan, Kenya, Kyrgyzstan, Malawi (2003), Mauritius, Moldova, Mongolia, Nigeria (2007), Poland, Romania, Slovakia, Tanzania, Uganda, and Uzbekistan.

[375] Evenett, S. J., *supra,* n. 206, p. 46

[376] See the Preamble to the UNCITRAL Model Procurement law.

[377] See the *World Bank Procurement Guidelines*, *supra,* n. 369, p.1.

the procurement of goods and works for the project. Therefore, as international institutions and donor countries finance projects and programmes in developing and low-income countries, these Guidelines regulate the necessary purchases for the goods and services required to execute these projects.

The Guidelines are "similar in many respects to the provisions of the [GPA] Agreement."[378] Section 1.3 of the WB procurement guidelines states that "Open competition is the basis for efficient public procurement", and advocated international competitive bidding as "the most appropriate method".[379] Chapter 5 also discusses how these multilateral agencies also pursue, through these procurement guidelines, the practice of GPP in their internal operations as well as external dealings with other stakeholders.

3.6 Summary

This chapter defined the concept of GP and its importance in international trade practice and regulation. It also highlighted the evolutionary stages of the regulation of government procurement from exclusion from the GATT 1947 to the negotiations leading to the 1979 Tokyo Round GPA, and finally, the GPA 1994. The chapter dwelt on the key provisions of the GPA which would provide the parameters and framework which will guide further discussions in the subsequent chapters of the thesis. These provisions relate to national treatment and non-discrimination, transparency, the rules on technical specifications of the subject-matter of procurement, and the general exceptions.

[378] UNCTAD/WTO, at: http://www.jurisint.org/pub/06/en/doc/C24.pdf (accessed 19/04/08)

[379] The procurers are usually private third parties even though state commercial entities are also eligible to bid for supply of the goods and services for the projects. The Guidelines, however, require that State entities when participating, should do so on purely commercial basis, and at par with private sector bidders.

CHAPTER 4

THE CLIMATE REGIME, THE ENERGY SECTOR AND GPP: THE LINKAGES

4.1 Introduction

This chapter addresses one of the major themes of this thesis, namely, the climate change problem. It aims to discuss climate change and its relates with the energy sector, and then establish its linkage with GPP policies. One major characteristic of climate change is the fact that it is intricately intertwined with the energy sector, and is thus linked to the economic growth and well-being of nations. Some economists describe this inter-relation in these words, "[t]he bottom line is stark. Economic growth is still directly linked to energy growth and energy growth is still directly linked to greenhouse gas (GHG) emissions."[380] Thus, the fact that energy is central to economic growth, and that the climate change problem is linked to the fossil energy sources, underlines the necessity to institute policies and measures to address the problem. In other words, finding solutions to the climate change problem is indirectly also addressing problems that face energy sector, which ultimately means also tackling global economic development.

Therefore, if government procurement is linked to, or contributes towards efforts to reduce GHG emissions, then this can find justification even in the WTO system which regulates international trade. It is part of the WTO objectives to pursue trade liberalisation while also protecting the environment for sustainable development.[381]

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[380] See Skrebowski, C., *2004 energy demand– too much of a good thing?* Petroleum Review Editorial - July 2005: available at http://www.energyinst.org.uk/index.cfm?PageID=1022 (last visited 12/01/08). This scenario is more aptly described as follows: "*Energy is central to our lives. We rely on it for transport, for heating and cooling our homes, and running our factories, farms and offices.*" See Europa: Working for the European Union: *Energy – Secure and sustainable supplies,* at http://europa.eu/pol/ener/overview_en.htm (accessed 23/12/08)

[381] WTO, Preamble to the WTO Agreement, 1994.

The Intergovernmental Panel on Climate Change (IPCC)[382] and the United Nations (UN) assert that climate change is mainly blamed on carbon dioxide emissions from economic activities in the energy sector,[383] particularly the fossil fuel exploration, extraction, development and combustion. Fossil-fuels are today already under immense pressure because of various and inter-related factors. These factors include the increase in demand partly as a result of rapid global population growth and then the economic growth in both the developed and developing countries. While the energy sector grapples with this pressure, the climate change challenge exacerbates the problem as its solution calls for a reduced production and use of fossil fuel sources, and emphasises on the development of *renewable* energy to serve as an alternative.

In consideration of this inter-connection between climate change and the energy sector, the UNFCCC and KP called upon nations to integrate climate change concerns in their national policies. It is in this spirit also that government procurement (GP) is being considered for climate change mitigation purposes. The UNFCCC Annex I parties thus see their climate friendly procurement policies as an effort to deliver global "public good" in economics parlance.[384]

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[382] The IPCC was established in 1988 under the auspices of the World Meteorological Organization (WMO) with support from the UNEP. All Member States of the WMO and of the UN are Members of the IPCC and can attend its sessions and those of its Working Groups.[382] The IPCC was established with the mandate inter alia, to "consider the need for identification of uncertainties and gaps in our present knowledge with regard to climate changes and its potential impacts, and preparation of a plan of action over the short- term in filling these gaps; [as well as the] review of current and planned national/international policies related to the greenhouse gas issue. The 43rd United Nations General Assembly (UNGA) (1988) on *"[p]rotection of the global climate for present and future generations of mankind"* endorsed the action of WMO and UNEP to establish the IPCC with its objectives and programme of action. See UNEP, *Intergovernmental* Panel *on Climate Change: 16 Years of Scientific Assessment in Support of the Climate Convention,* (December 2004), p 2-3, available at http://www.ipcc.ch/pdf/10th-anniversary/anniversary-brochure.pdf (last visited 08/12/07).

[383] According to Cara, B., in *Bill Cara's "Understanding of the Energy Sector,"* the energy industry comprises of "oil and gas, coal, and alternative fuels … Electricity generation is the energy sector's main activity, with almost half the electricity produced in thermal power plants using fossil fuels. See Environmental Assessment Report No 6: Environmental signals 2000: (http://reports.eea.europa.eu/signals-2000/en/page005.html).

[384] See Carraro and Egenhofer, *supra,* n. 43.

GP however, is a subject of international trade and is primarily regulated by the WTO Agreement on Government Procurement (GPA). The GPA as seen in the preceding chapter seeks to discipline the conduct of its parties in their procurement regulations and activities. It, for instance, requires caution in the way the Parties would use GP to pursue environmental objectives. This therefore calls for an examination of the ways GP policies interact with climate change objectives. This examination will help States to establish coherence and coordination as well as cooperation in the establishment and interpretation of the international legal regimes regulating inter-dependent sub-sectors, such as trade and climate change.

This Chapter thus provides background information and establishes the basis for GPP as a climate change policy measure. The chapter first highlights the concept of climate change as a scientific phenomenon, as expounded by the IPCC. This will be followed by an examination of the global legal regime to address the problem of climate change, namely, the UNFCCC and KP. There is also a brief survey of the principles guiding the implementation of the instruments as well as the international and domestic compliance mechanisms. However, the concept of GPP and how it may affect the parties' obligations under trade rules is specially treated in Chapters 5 and 6 of the thesis.[385]

4.2 Climate change and the environmental challenge: a brief overview

4.2.1 Climate change in context

The IPCC defines Climate Change as "a statistically significant variation in either the mean state of the climate or in its variability, persisting for an extended period (typically decades or longer). Climate change may be due to natural internal processes or external forcings, or to persistent anthropogenic changes in the

[385] The literature relied upon in the preparation of this Chapter is mainly institutional sourced from the official public documents of the secretariats and websites of the IPCC, UNFCCC/KP, WMO, UNEP, IEA, EU GPP, and so on. These are complemented by secondary sources and academic writings.

composition of the atmosphere or in land use"[386] Stated more simply, "climate change is any natural or induced change in climate, either globally or in a particular area."[387] According to the UNFCCC however, Climate Change is "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods".[388] The UNFCCC thus makes a distinction between "climate change" attributable to human activities altering the atmospheric composition, and "climate variability" attributable to natural causes. And for the purpose of the UNFCCC, climate change is that which is attributable to human causes.[389]

These definitions entail one central common message, namely, that the climate is not static, and its change can be caused naturally or *anthropogenically*. The terminology used by the UNFCCC is of special significance, in that when climate is altered by natural causes it is referred to as climate *variability*, which could mean no one is to blame but Mother Nature herself. But where the alteration in the climate is caused by *external* forces, and in this case, human activities, it is referred to as *climate change,* where *change* means alteration. If man alters (changes) the natural course of the climate to satisfy his appetite, then man has the responsibility to do so

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[386] WMO & UNEP, *IPCC 16 years of Scientific Assessment in Support of the Climate convention, p. 4 (IPCC December2004).* The term "anthropogenic" climate change refers to that which relates to, or results from the influence of human beings. See also IPCC, 2007: Summary for Policymakers. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental* Panel *on Climate Change* [Solomon, S., D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M.Tignor and H.L. Miller (eds.)]. Cambridge University Press, Cambridge, United Kingdom, 2007), p. 1, n. 1., See also *Report of the Commission of the Environment and Sustainable Development*, Canada, to the House of Commons, September, 2006, at p.30; Obioh, I.B., *Climate Change: Causes, Analysis and Management* Paper presented at a Climate Change workshop. Abuja, April 2002.

[387] Park, Chris, Oxford Dictionary of Environment and Conservation, (Oxford University Press, 2007), p. 42.

[388] UNFCCC Art. 1 available at http://unfccc.int/resource/docs/convkp/conveng.pdf (last visited 14/12/07).

[389] *Ibid.*. See also IPCC, *Climate Change 2007: The Physical Science Basis Summary for Policymakers Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental* Panel *on Climate Change,* p. 2 footnote 1 available at http://www.aaas.org/news/press_room/climate_change/media/4th_spm2feb07.pdf (last visited 02/01/08).

in a sustainable manner, and also to make amends where damage is done. This is the guiding philosophy behind the call for international cooperation to address anthropogenic climate alteration. This research, adopts the UNFCCC sense of the term "climate change".

4.2.2 Climate change as a challenging environmental problem

Climate change is believed to be "one of the most significant environmental challenges that mankind faces in the twenty-first century."[390] The gravity of the challenge stems from its complexity in terms of causes, and also the scientific uncertainty as to the extent of its future implications, and more particularly, "in the determination of the rate of climate change, the impacts on regional scales where society and environment are most vulnerable and the occurrence of extremes."[391] Another level of "uncertainty" relates to the GHG emissions and removals as a result of a variety of reasons, including uncertainty as to "the availability of sufficient and appropriate data and the techniques to process them."[392]

Carraro and Egnhofer identified seven "peculiar features" which distinguish the climate change problem from other environmental problem and which must be taken into account in fashioning out any agreement towards addressing the problem. These are as follows:

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[390] United Nations Development Program (UNDP) Human Development Report (HDR) 2007 declares that *"Climate change is the greatest challenge facing humanity at the start of the twenty-first century. Failure to meet that challenge raises the spectre of unprecedented reversals in human development. The world's poorest countries and poorest people will bear the brunt. Failure to respond to that challenge will stall and then reverse international efforts to reduce poverty."* Similarly, on the urgency to act to reverse the climate change phenomenon, and take effect adaptation measures, Yvo de Boer, the head of the UNFCCC, in November 2007, declared that *"Failure to recognize the urgency of this message and to act on it would be nothing less than criminally irresponsible."* See generally Goodland, R., and Counsell, S., *How the World Bank Could Lead the World in Alleviating Climate Change,* OGEL Issue: September 2008 (provisional) available at www.ogel.org accessed (09/10/08). See also Freeston, D. and Streck C. (eds.), Legal Aspects of Implementing Kyoto Protocol Mechanisms: Making Kyoto Work, (Oxford University Press, Oxford, United Kingdom, 2005), p. v.

[391] See World Climate Change Research Programme (WCCRP), *Anthropogenic Climate Change (ACC)* at http://wcrp.ipsl.jussieu.fr/SF_ACC.html (last visited 12/12/07).

[392] See International Institute for Applied Systems Analysis (IIASA) Policy Brief (December, 2007), *Uncertainty in Greenhouse Gas Inventories.* Uncertainties play a role in determining whether or not a country's commitments to reduce greenhouse gas emissions are credibly met. (available at www.iiasa.ac.at)

> [1] The problem is global; this implies that climate change control is a public good, providing strong motivation for free-riding. [2] The long-term nature of climate change necessitates taking into account not only long periods – sometimes stretching over half a decade or even beyond - but also but also dealing with intergenerational transfers that any regulation implies. [3] There exist no narrowly defined technological solutions as in the case of Montreal Protocol to phase-out ozone-depleting substances. [4] Greenhouse gas (GHG) emissions and their reductions affect in a fundamental way all economic activities including agriculture, transport, manufacturing and services, and by extension, our lifestyles. [5] Climate change measures exhibit strong interactions with other parameters population and economic growth, rate of technological progress, competitiveness or core- benefits, such as reduction of local pollution, energy security or even development. [6] Quantitative and even qualitative measurement in the past has proven to be difficult. [7] The climate change problem is surrounded by pervasive uncertainty. While there is a global consensus that we know enough to justify action, there is disagreement on almost every other aspect, notably on the rate of climate change, the necessary level of stabilization of concentrations, impacts and their probabilities, mitigation and adaptation costs, and even on the cause of climate change.[393]

The climate change concern though is not a new phenomenon. Scientists indeed started critical observation of climate change since early 19th Century.[394] In 1827, for instance, French scientist Jean-Baptiste Fourier identified the existence of greenhouse effect.[395] Also the global warming idea was already in the news media as early as 1930s. For instance, the *Time* magazine in 1939 reported that "gaffers who claim that winters were harder when they were boys are quite right … weather

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[393] Carraro, C., and Egenhofer, C. *supra,* n. 43, pp. 1-2. See also Carraro, C. and Goleotti, M., *The future evolution of the Kyoto Protocol: costs, benefits and incentives to ratification and new international regimes,* in Carraro, C. and Egenhofer, C. (eds.), Firms, Governments and Climate Policy: Incentive-Based Policies for Long-term Climate Change, (Edward Elgar, Cheltenham, UK: 2003).

[394] For an account of earlier attempts towards scientific understanding and expounding of the climate, see *The Historical Roots of WMO,* at *World Meteorological Organization celebrates 50 years of service* at http://www.wmo.int/pages/about/wmo50/e/wmo/history_e.html (last visited 11/01/08).

[395] See Evans, A., and Steven, D., *A short history of perceptions of climate change,* in "Climate change: the state of the debate," p. 4, (Centre on International Cooperation: *The London CO_2 Accord,* October, 2007).

men have no doubt that world at least for the time being is growing warmer."[396] That time, however, the idea that humans could influence adverse changes in the climate system was "very repugnant to some," as evidenced by common reaction to an evidence presented, in 1938, by Scientist *GS Calendar* to the effect that fossil fuels indeed could do so through carbon dioxide (CO_2) emissions.[397]

The anthropogenic climate change concerns however, were first formally expressed by the *"World Climate Conference"*[898] organised by the World Meteorological Organization (WMO) in 1979. The conference stated that "…continued expansion of man's activities on earth may cause significant extended regional and even global changes of climate".[399] The conference then advocated for "global cooperation to explore the possible future course of global climate and to take this new understanding into account in planning for the future development of human society."[400] This call was eventually heeded to, and as a starting point, the IPCC was established in 1988. Subsequent upon that development also, the UNFCCC was signed in 1992, and the Kyoto Protocol negotiated in 1997 to provide for a legal regime to address the climate problem.

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[396] *Ibid.*, citing Time, *Warmer World,* 2 January, 1939, p 27.

[397] *Ibid.*, Calendar, personal notes, Nov. 1960, Schove-Calendar Collection, Climatic Research Unit, University of East Anglia, Norwich, UK, quoted by Peter Brimblecombe and Ian Langford, *Guy Steward [sic] Calendar and the increase in global carbon dioxide,* paper presented at meeting of Air & Waste Management Association, San Antonio, Texas, June 1995 (paper 95-WA74A.02, available from AWMA) (See http://www.london-accord.co.uk/final_report/reports/pdf/b1.pdf (last visited 1/12/08). For more on global warming timeline, see Global Warming: The History of an International Scientific Consensus at http://www.docuter.com/downloaddocument.asp?documentid=385918364495b9901b817012307397 13

[398] This Conference, held on 12-23 February 1979, in Geneva, was the first in the series of the World Climate Conferences as sponsored by the WMO. The Conference led to the establishment of the WCRP. Source: http://en.wikipedia.org/wiki/World_Climate_Conference (last visited 11/12/08).

[399] *Ibid.*.

[400] *Ibid.*

Thus, the IPCC is closely involved in the UNFCCC process. Indeed, the IPCC First Assessment Report in 1990 provided the basis for the UNFCCC.[401] The negotiations for the UNFCCC were also coordinated with the preparations for the UNCED[402] in 1992 at which the Convention was eventually opened for signature. It should also be pointed out that the *GATT Group on Environmental Measures and International Trade* was invited to make inputs in the draft UNFCCC.[403]

4.3. Climate change and the energy sector

4.3.1 The climate change and fossil energy sources

The relationship between climate change and the energy sector presents an intricate scenario. This is because the energy sector is dominated by fossil-based sources mainly blamed for the anthropogenic climate change. CO_2[404] which is the primary GHG represents two-thirds of total greenhouse gas emissions in developed countries.[405] The irony however, is while the fossil-based energy sources are the main cause of the anthropogenic climate change, the non-fossil sources of the same energy sector, namely, the renewables, are part of the solution.[406] In its latest publication on the interactions between energy and climate change, the IEA re-

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[401] See IPCC *Second Assessment Synthesis of Scientific-Technical Information relevant to interpreting Art. 2 of the UN Framework Convention on Climate Change,* at http://www.ipcc.ch/pdf/climate-changes-1995/2nd-assessment-synthesis.pdf .

[402] See UNCED *supra,* n. 60.

[403] Indeed the GATT Secretariat did also contribute in the preparatory stage of the 1972 UN Conference on Human Environment (UNCHE) when the environment agenda began to manifest on the global arena through the UN system. The GATT Secretariat contribution was in a study entitled *"Industrial Pollution Control and International Trade"*. The study focused on "the implications of environmental protection policies on international trade. See WTO, *Early years: emerging environment debate in GATT/WTO*, at http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm (accessed 07/09/09). See Chapter 5 Section 4.1.1.

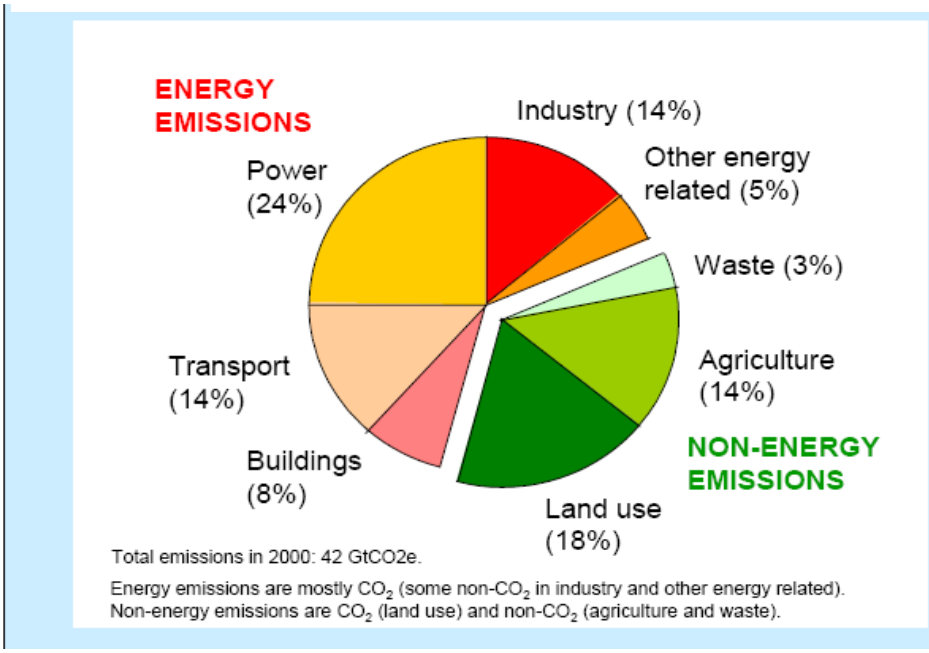
[404] See *Whorf, T.P., and Keeling, C.D.,* "Atmospheric CO_2 records from sites in the SIO air sampling network *(2005).*

[405] *Ibid.* See also Rubin, E., (et al), *IPCC Special Report Carbon Dioxide Capture and Storage (Technical Summary),* available at http://www.ipcc.ch/pdf/special-reports/srccs/srccs_technicalsummary.pdf

[406] Government of United Kingdom Press Statement, *Department of Energy and Climate Change Established,* 3 October 2008, "Ed Miliband, the new Secretary of State for Energy and Climate Change, today welcomed the creation of a new department to tackle the twin challenges of energy security and climate change. Mr. Miliband said: *"The new department reflects the fact that energy policy and climate change are directly linked."*

asserted this paradox by saying that "[E]nergy which accounts for two-thirds of today's greenhouse gas emissions is at the heart of the [climate change] problem – and so must form the core of the solution."[407] It warned that countries must change their energy and environmental policies in order to catalyse the transition to a more sustainable future.[408]

Figure 1 Greenhouse gas emission in 2000, by source



Source: **Stern, N., *Review Report on the Economics of Climate Change, 2007***[409]

Figure 1 above from the *Nicolas Stern Review Report*, shows the extent and magnitude of the energy-related CO_2 emissions arising from industrial processes, as at the year 2000. It indicates that about 65% of the said emissions emanate from energy-related sources as against 24% non-energy related sources (which includes

[407] See IEA, *How the Energy Sector can deliver on a climate agreement at Copenhagen*, in World Energy Outlook 2009 (Climate Change Excerpt) (IEA/OECD, 2009), p. 3.

[408] *Ibid.*

[409] See Stern, N., *Stern Review Report on the Economics of Climate Change (Executive Summary)*" p. iv available at http://www.hm-treasury.gov.uk/media/4/3/Executive_Summary.pdf (last visited 10/01/10).

agriculture and land use).[410] This representation indicates clear dominance of the energy sector in GHG emissions, hence the response measure being directed at that sector and particularly power generation by different sources. This development naturally is sensitive as it already has "heightened the concern about climate change and energy security."[411] Hence, the climate change phenomenon, as Baron puts it, has become the "most daunting issue of global energy and environmental policy…"[412]

Indeed some of the UNFCCC Annex I Parties see opportunities too in this climate-energy interaction. They seek to do this by, for instance, specifying in their tenders for energy, that a certain percentage be generated from the renewable sources. The UK government even went a step further and established in 2008 a new government department to deal with climate-energy interactions.[413] Similarly, the EU GP law and policy has integrated GPP into its energy and environmental policy objectives.[414]

4.3.3 Climate change and the global cooperation for energy transition

Looking at the situation affecting the energy sector as highlighted in the preceding paragraphs, it is logical to say that the consumption rate of energy is unsustainable. But the climate change phenomenon, which directly is linked to, and requires abstention from, the fossil energy, is making it even more unsustainable. In order to effectively address climate change therefore a transition is required in the way

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[410] *Ibid.* See also Harrison, G., *Climate Change Impacts on Renewable Energy,* University of Edinburgh, available at: http://www.see.ed.ac.uk/~gph/climate/

[411] Baron, R. and Philibert, C, Act Locally, Trade Globally: Emissions Trading for Climate Policy, (OECD/IEA, 2005), at 43. See also U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 – 2006* (USEPA, Washington, DC, USA, 2008), Chapter 3: Energy.

[412] *Ibid.*

[413] This is the Department of Energy and Climate Change at: <http://www.decc.gov.uk/>. This, according to its first Secretary, Ed Milliband, "reflects the fact that energy policy and climate change are directly linked".

[414] *Ibid..*, See also Chapter 6, Section 6.6.

global energy is sourced and used. Developing renewables and energy efficiency policies addresses not only the climate problem but also contributes to improving energy security and protecting the environment [climate change].[415] Agenda 21 adopted at the Rio Conference places much emphasis on this climate change link and called upon governments to realise that:

> "[t]he need to control atmospheric emissions of greenhouse and other gases and substances will increasingly … be based on efficiency in energy production, transmission, distribution and consumption, and on growing reliance on environmentally sound energy systems, *particularly new and renewable sources of energy…* "[416] *(Emphasis added)*

Renewable energy sources generally consist of biomass, geothermal energy, hydro electric power, landfill gas, tidal power, wave power and solar power. By definition, *renewable energy* is "clean" because it produces less emissions or pollutants, and has minimal impact on the ecosystems. The environmental benefit of renewable energy is seen in green electricity that it produces.[417] Hence, green electricity became the target area for EU GPP policy.[418]

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[415] IEA, Energy Security and Climate Policy Assessing Interactions, (IEA, 2007) p. 44.

[416] See Agenda 21, Clause 9.9-9.10. See also Lyster, R., *The Implications of Electricity Restructuring for a sustainable Energy Framework: What's Law Got to Do with It?* in Bradbrook, A. J., (et al) (eds.), The Law of Energy and Sustainable Development, IUCN Academy of Environmental Law Research Studies, (Cambridge university Press, New York, 2005), p. 416.

[417] Note however that renewables also have negative environmental impacts. This is another area of study, though. See for example, Owen, A. D., *Renewable energy: Externality costs as market barriers*, Energy Policy 34 (2006) 632–642

[418] Currently though, it is only hydro and biomass that provide a significant amount of such clean power. Green power thus could help reduce dependence on fossil fuels. See EC, *Energy for the Future: Renewable Sources of Energy:* White Paper for a Community Strategy and Action Plan COM (97)599 final (26/11/1997). Another side-benefit in economics terms is that renewables will create jobs. The EU, for instance, believes that some 500,000 – 900,000 permanent jobs would be created either directly in the renewables sector or indirectly in the supply industry. See *OPINION of the Committee on the Environment, Public Health and Consumer Policy for the Committee on Industry, External Trade, Research and Energy on 'Electricity from renewable energy sources and the internal electricity market'* (SEC(1999)470 – C5-0342/1999 – 2000/2002(COS)) (Draftsman: Johann Kronberger 25 February 2000).

4.4 The global regulation on climate change mitigation

UNFCCC and KP are the global legal regimes to tackle climate change. While the UNFCCC provides for the skeletal *framework* defining the *problem*, setting the *objectives* and suggesting the *solutions*, the KP sets out the legally binding mechanisms and actions needed to give effect to the purport of the Convention. The two instruments therefore are interdependent and complementary. They also attempted to define their relationship with other sub-sectors of international law that may affect their implementation. In this regard, and of particular relevance to this research, they specifically urged the Parties to avoid coming into conflict with their obligations under the international trade regime by seeking to achieve their objectives though trade–restrictive climate policies. This section therefore explores the relevant provisions of the UNFCCC and KP, and the domestic policy options proposed under them.

4.4.1 The Framework Convention on Climate Change 1992

4.4.1.1 Objectives of the Framework Convention on Climate Change

The UNFCCC[419] was adopted in 1992 alongside the Agenda 21 at the UNCED.[420] It entered into force on 21 March 1994 after deposit of the 50th instrument of ratification. The Parties, as stated in the Preamble, inter alia acknowledge that "change in the Earth's climate and its adverse effects are a common concern of humankind."[421] The Parties also are concerned that increases in the atmospheric concentrations of GHG caused by human activities will result in more warming of the atmosphere, and which is inimical to natural ecosystems and humankind.[422] The

[419] UNFCCC, *supra,*, n. 1

[420] See Report of the UNCED, *supra,* n. 60. Other documents adopted at the UNCED are *the Rio Declaration on Environment and Development; Statement of principles to guide the management, conservation and sustainable development of all types of forests, and the Convention on Biological Diversity.*

[421] See the Preamble to the UNFCCC. See also Cottier, T. and Matteotti-Berkutova, S., *International Environmental Law and the Evolving Concept of Common Concern of Mankind,* in T. Cottier *et al* (eds.), *supra,* n. 11.

[422] *Ibid.*

Parties then expressed their resolve and determination "to protect the climate system for present and future generations".[423] Accordingly, the Convention set as its ultimate objective the stabilizing of GHG emissions:

> … at a level that would prevent dangerous anthropogenic interference with the climate system ... such a level should be achieved within a time-frame sufficient to allow ecosystems to *adapt* naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner..[424]

The provision above signifies the *adaptation* measures to be taken as part of the response mechanisms.[425] Although the main concern of this thesis is mitigation actions, going by Art. 2 of the Convention, the two are complementary. Indeed *mitigation* of greenhouse gas emissions reduces the need for *adaptation* to the effects of aggregated emissions over time. The Convention is administered by the Convention Secretariat[426] which, inter alia is responsible to "facilitate the flow of authoritative information on the implementation of the Convention administrative organs".[427] It coordinates the activities of the Conference of the Parties (COP), which is the "supreme body" of the Convention, and its highest decision-making authority.[428]

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[423] *Ibid.*

[424] UNFCCC Art. 2. [Emphasis added]

[425] There are two responses to global climate change identified by the IPCC: Mitigation and Adaptation: (1) *Mitigation*: Policies to reduce the GHG emissions or enhance the GHG sinks. Mitigation relates to action to reduce future emission; and (2) *Adaptation*: The *IPCC Third Assessment Report (TAR)* describes adaptation as an "adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities." *IPCC TAR-II*, p. 982. See also WMO *"Climate information for adaptation and development needs,"* (World Meteorological Organization 2007): http://www.wmo.int/pages/publications/showcase/documents/WMO_1025_web_E.pdf (last visited 25/04/09). Indeed, adaptation strategy is taking a centre-stage in the current processes to fashion out the successor-regime to KP for the period after 2012.

[426] The UNFCCC Secretariat is located at Bonn, Germany.

[427] UNFCCC at: http://unfccc.int/secretariat/items/1629.php

[428] The COP comprises of all the countries that are Parties to the Convention. It meets annually basis.

4.4.1.2 Parties to the Convention

The Convention recognises the fact that anthropogenic climate change was the product of industrial era when the developed nations exploited fossil-based energy sources to fund their economic development activities. It thus apportions responsibilities for addressing climate change in accordance with historic contributions made to the activities that brought about the current state of the climate. Accordingly, the Convention divided countries that are signatories to the Convention[429] into three main groups and apportioned to each group commitments, thus: Annex I, Annex II and Non-Annex I Parties. Annex I Parties[430] are the industrialized countries, essentially the OECD (Organisation for Economic Co-operation and Development) member countries as at 1992.[431] It also includes countries with economies in transition (the EIT Parties).[432] Annex II Parties consist of the OECD members of Annex I, but not the EIT Parties. They are required to provide financial resources to enable developing countries to undertake emissions reduction activities under the Convention and to help them adapt to adverse effects of climate change. Non-Annex I Parties[433] are mostly developing countries.[434]

The above arrangement is a reflection of the principles of *equity* and *common but differentiated responsibilities.* These principles are provided for in the Preamble to

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[429] There are 192 Parties and 4 Observers to the Convention (as at August 5 2009).

[430] There are 41 Annex I Parties. See UNFCCC website: http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php (last accessed 05/08/09)

[431] These are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. See OECD Member Countries available at http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (accessed 05/08/09)

[432] These including the Russian Federation, the Baltic States, and several Central and Eastern European States.

[433] Non-Annex I Parties are currently 151 as at August 5 2009. See the list at UNFCCC http://unfccc.int/parties_and_observers/parties/non_annex_i/items/2833.php?plus=j

[434] See UNFCCC, Parties, available at: http://unfccc.int/parties_and_observers/items/2704.php

the Convention, and then detailed in Articles 3.1[435] and 4.2. Thus, according to the principle *of common but differentiated responsibilities*, the Annex I developed country Parties are required to adopt policies and measures and to lead the in fight against climate change. They should also, together with annex II parties pay the full cost of the mitigation and adaptation efforts taken by developing countries as provided for in Art. 12 on clean development mechanism (CDM). Thus, GPP policies so far are still an Annex 1 Party activity.[436] Under the Kyoto Protocol, the Annex I Parties specifically committed themselves to "binding" GHG emissions reduction targets. They stated these targets in Annex B to the Protocol.[437]

4.4.2 The Kyoto Protocol and GHG emissions reduction strategies

The UNFCCC envisioned the necessity for protocols by which to implement the Convention and pursue its objectives.[438] The protocols would facilitate setting of realistic future targets, time and work plans, and to set binding commitments, rules and regulations and procedural mechanisms to guide and support international actions for the attainment of the objectives of the Convention.[439] The Conference of the Parties (COP) was established to serve as the administering organ and to provide the secretariat for the conduct of these future protocols and negotiations.[440] The first Protocol signed under the convention is the first Kyoto Protocol.

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[435] Art. 3.1 states thus: "*The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof."*

[436] Some industrialising developing countries like China and India have also started GPP programmes.

[437] The Annex B list of the Kyoto Protocol containing the Annex I Parties' emissions reduction commitments is attached at as Annex 4 to this thesis.

[438] UNFCCC Art. 17.

[439] *Ibid.,* Arts. 12-18.

[440] See Hodas, D. R., *Sustainable Development and the Marrakesh Accords,* in Bradbrook, A. J., et al, (Eds.) The Law of Energy for Sustainable Development, (IUCN, Gland, Switzerland and Cambridge, UK, 2005) pp. 57-74.

4.4.2.1 Kyoto Protocol: an Overview

The Kyoto Protocol to the UNFCCC was adopted in 1997 and came into force on 14th February 2005.[441] The major distinction between the Protocol and the Convention is that while the Convention *encouraged* industrialised countries to stabilize GHG emissions, the Protocol *commits* them to do so.[442] The Protocol shares and strengthens the Convention's objective and principles, and under Art. 3, establishes cumulative (five–year), legally-binding caps on the anthropogenic emissions of GHGs by the Annex 1 countries. The commitment targets of the Annex I Parties are listed in the Kyoto Protocol's Annex B. These add up to a total cut in greenhouse-gas emissions of at least 5% from 1990 levels on the average[443] in the first commitment period 2008-2012.[444] The targets compare emissions for the period 2008-2012 against a baseline year of 1990.

However, the Protocol itself as at the time of its adoption was more "a framework than an agreement ready for immediate implementation."[445] This was because there

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[441] When the UNFCCC was adopted in 1992, governments recognised it was more of a "launching pad" for more vigorous future actions. It established a process of review, discussions and information exchange as more scientific understanding and political will improves. At the 1st Session of the Conference of the Parties (COP-1), at Berlin, Germany adopted the Berlin Mandate which suggested that in order to achieve the long-term objective of the Convention, the initial commitment by developed countries to reduce and return the GHG emissions their 1990 levels by the year 2000 was inadequate. The Session therefore established the Ad –Hoc Group the Berlin Mandate (AGBM) to draft an agreement to this which facilitate more realistic reduction of the GHG. The draft was presented to COP3 in 1997 at Tokyo for and was adopted there, by consensus. See UNFCCC Secretariat, The Kyoto Protocol to the Convention on Climate Change, (UNEP/IUC, 2002), p. 1.

[442] See UNFCCC Secretariat, at http://unfccc.int/kyoto_protocol/items/2830.php (last visited 14/01/09).

[443] The 1990 was chosen as the baseline year for the purpose of calculating the progress made in the GHG reductions effort. According to IPCC: "The atmospheric concentrations of key anthropogenic greenhouse gases (i.e., carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), and tropospheric ozone (O3)) reached their *highest recorded levels in the 1990s,* primarily due to the combustion of fossil fuels, agriculture, and land-use changes." And because of the availability of an "increasing body of observations" about the warming world and other changes in the climate system, the IPCC concluded that *"[Globally] it is very likely that the 1990s was the warmest decade, and 1998 the warmest year, in the instrumental record.*"(Emphasis added)

[444] The first "commitment period" has just started on 1 January 2008, will continue for five years, concluding on 31 December 2012.

[445] See Streck, C., *Joint Implementation: History, Requirements, and Challenges,* in Freestone, D., and Streck, C., (eds.), *supra,* n. 390.

were several major issues on which the Parties still needed to agree, provide details, administer and implement. These include the Kyoto mechanisms, the rulebooks for which negotiations were only concluded at Conference of the Parties (COP) No. 7 held 29 October to 9 November, 2001 in Marrakesh, Morocco, otherwise known as "Marrakesh Accords".

As part of the objectives of the climate policy under the UNFCCC, the KP instituted response measures by which to pursue stabilization of GHG emissions. These measures should be experimented by Annex 1 countries both at domestic and international levels. The Kyoto international mechanisms are designed to help Annex I Parties cut the cost of meeting their emissions targets by taking advantage of opportunities to reduce emissions, or increase greenhouse gas removals, that cost less in other countries than at home. They are, the *International Emissions Trading (ET)*[446]*, Activities Implemented Jointly* (or *Joint Implementation*)[447] and *Clean Development Mechanism* (CDM).[448] How these mechanisms work and the corresponding legal analysis has been subject of extensive discussion in other literature.[449]

By virtue of Art. 17 of the KP, Parties however are expected to perform the bulk of their emissions reduction obligation under Art. 3, through domestic policies and measures, while adopting the international options only as *supplementary* mechanisms for the attainment of the UNFCCC's objective.[450] This supplementarity

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[446] KP Art. 17

[447] *Ibid*., Art. 6

[448] *Ibid*., Art. 12

[449] See for instance, Freestone, D. and Streck C. (eds.), *supra,,* n. 390.

[450] *See* Pan, H., *The economics of Kyoto flexible mechanisms: a survey* (Centre for Economic Studies Energy, Transport & Environment, University of Leuven, 2001). See also Redgwell, C., *Non-Compliance Procedures and the Climate Change Convention,* in Chambers, W. B. (ed.), Inter-linkages _The Kyoto Protocol and the International Trade and Investment Regimes, (United Nations University Press, 2001), pp. 52-53.

theory[451] was up-held at COP7 (The Marrakesh Accords) whereat the Parties affirmed that "the use of the mechanisms shall be supplemental to domestic action, and … domestic action shall constitute significant element of the effort made by each Party included in Annex I to meet its quantified emission limitation and reduction commitments under Article 3, paragraph 1."[452]

4.4.2.1 The Kyoto Protocol and domestic policies and measures

The domestic measures are not specified by the KP, and this allowed the Parties wide leverage and opportunities to include any policies and measures aimed at emissions reduction. GPPfalls under the domestic measure classification. The KP under Art. 2 called upon the Annex 1 countries to:

> "… strive to implement policies and measures [to combat climate change] under this Art *in such a way as to minimise adverse effects, including the adverse effects of climate change, effects on international trade,* and social, environmental and economic impacts on the parties, especially developing country Parties."[453]

The above generalised instruction only provides for an indicative list of policies and measures required to reduce GHG emissions and promote sustainable development. Thus the Protocol in Art. 2(3)(a) requires each Annex-I country to, inter alia implement and/or elaborate policies and measures to enhance energy

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[451] The *supplementarity* theory though has been subject of some controversy and extensive debate in the academia, especially among economists. The controversy surrounds not only what constitutes "supplemental" but how measure the domestic actions and what percentage of it that will qualify a Party to pursue the supplementary internationally mechanisms. In the Bonn Agreement, reached at COP6, 2001, Parties agreed to a "qualitative" definition of supplementarity. This meant that Parties' domestic efforts [as gathered from information supplied by each party in accordance with KP Art. 7] would be rated to the minimum level of sufficiently "significant." The rating will be made by the Compliance Committee's facilitative branch. It is argued that without a quantitative definition of supplementarity, the qualitative approach will make no meaning in real terms. Consequently, supplementarity requirement may not be an effective constraint on Parties' use of the Kyoto mechanisms. See Climate change Knowledge network: *Climate compendium, international negotiations*, - *Kyoto Mechanisms update:* COP6 Bonn, 2001 available at: http://www.cckn.net/compendium/int_kmu.asp . For more on the economic argument on supplementarity theory see Hourcade, J and Ghersi, F., *The Economics of a Lost Deal* 01–48 Resources for the Future Discussion Paper December 2001) 01-48; available at: http://www.rff.org (accessed, 20/04/10)

[452] See the *Preamble to Marrakesh Accords & the Marrakesh Declaration at* Marrakesh, Morocco 2001 as well as decisions no. 1, available at: http://unfccc.int/cop7/documents/accords_draft.pdf

[453] Art. 2:3. (Emphasis added)

efficiency, and to promote development and use of renewable forms of energy and new innovative environmentally sound technologies.

Pursuant to the mandate given under this provision since the year 2000 - 2001 after the Bonn Agreement,[454] the Kyoto Annex B Parties especially from among the OECD Member countries have instituted or proposed different domestic policies and measures (PAMs) for emissions reduction. These PAMs take both the forms of regulatory (regulations, standards and guidelines, including voluntary agreements), and market-based (emissions trading, tradeable renewable certificates) approaches. Indeed, many countries use "a portfolio approach"[455] to policy-making by which various complementary policies are integrated and pursued together in order to maximise the result, save time and resources. In the EU, for example, energy policy is integrated with environment policy, while public procurement legislation is used to pursue climate change, energy and environmental policy. It is also for this reason manner that France suggested for the EU to impose green or CO_2 tax on imported auto-mobile and other energy-intensive products.[456] The purpose of the tax is to inter alia safeguard the competitiveness effect of the EU GHG emissions reduction policies, on the domestic industry. Another example is the proposed imposition of permit allowances under the EU ETS on imports to value equivalent to the domestic producers of energy-intensive sectors and sub-sectors otherwise called "FAIR".[457]

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[454] "Bonn Agreement to the Kyoto Protocol" is the international climate negotiations that took place in Bonn from 16 to 27 July 2001, after the failure of the Sixth COP in November 2000. This agreement is described as "a set of political compromises for the most contentious issues left open by the Kyoto Protocol". See Ott, H. E., *The Bonn Agreement to the Kyoto Protocol Paving the Way for Ratification* International Environmental Agreements: Politics, Law and Economics **1**: 469–476, (Kluwer Academic Publishers. Printed in the Netherlands 2001).

[455] See, IEA, Dealing with Climate change: Policies and Measures in EIA Countries" (2001 Edition), 11 (OECD/IEA, 2001).

[456] See Weirs, J., *French Ideas on Climate Change and Trade Policies,* CCLR 1/2008. See also Financial Times report

[457] FAIR: *Future allowance import requirements.*

FAIR is proposed to be applied against countries which have not undertaken comparable reduction commitments as those taken by the EU.[458]

It has been noted earlier how, in the same direction, the United Kingdom even created a new department/ministry for energy and climate change. Generally, the policy mix for GHG reduction depends on "cost, social concerns, administrative feasibility and institutional capacity, as well as national culture."[459] One common theme about all the different policy instruments is the relationship they have with, or impact on, emissions reduction, improvement of the energy sector situation, and sustainable development. GPP which is more of market-based is the subject of the next chapter of this study.

4.4.3 The principles for implementing the climate regime commitments

Pursuant to its primary objectives, and taking into account the relationship of climate change with the energy sector, the UNFCCC devised appropriate principles to guide its implementation. Most of these principles are provided for under Art. 3 of the Convention. These include the principles of equity, common but differentiated responsibilities and polluter-pays, precaution, cost-effectiveness, the right to sustainable development, and the avoidance of arbitrary restriction on international trade. Discussions will however be limited only to the most relevant of these principles to this study. These are the principles of sustainable development, precaution and avoidance of trade restriction.[460]

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[458] See *EC Communication on the Proposal for a Directive Amending Directive 2003/87/EC (ETS) (1)*, Art. 10. The FAIR is proposed to only apply to goods which are subject of significant risk of carbon leakage, and would not apply to countries and administrative entities which are taking action to reduce GHG emissions comparable to the action taken by the EU. See ICC side-event presentation entitled: *Trade and Climate Change,* by Reinhard Quick, available at: http://www.iccwbo.org/uploadedFiles/ICC/policy/Environment/Presentation%20by%20R.%20Quick.ppt#264,8, FAIR – will it work? (1)

[459] *Ibid.*

[460] For discussions on equity and common but differentiated responsibilities, see *Climate Change and Human Rights: A Rough Guide* 2008 International Council on Human Rights Policy, 2007) p. 60. See also UNDP HDR 2007/08, available at http://hdr.undp.org/en/reports/global/hdr2007-2008, as well as UNDP

4.4.3.1 The principle of sustainable development

The UNFCCC asked the Parties to "protect the climate system *for the benefit of present and future generations of humankind...*"[461] This thus makes the principle of sustainable development (SD) a guiding principle for the implementation of the climate convention. SD is defined by the *World Commission on Environment and Development* (Brundtland's Commission) as the "development that meets the needs of the present and without compromising the ability of the future generations to meet their own needs"[462] The principle, which had its roots in the *1972 Stockholm Conference on Human Environment,*[463] also led to the explosion of more multilateral environmental conferences, agreements (MEAs) and institutions from the 1980s.[464] The principle was particularly popularised first by the Brundtland Commission which was charged, inter alia, with the preparation of the UNCED in 1992.[465] Indeed the definition of the principle of sustainable development[466] as expounded by the said

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HDR 2007/08, available at http://hdr.undp.org/en/reports/global/hdr2007-2008/; For Polluter-pays-principle as related to climate change, see Otsuka, T., *Designing an International System to Prevent and Adapt to Global Warming: The Japanese Perspective,* A paper presented at an international workshop on A Future Climate Regime and Legal Principles, Shoji houmu Kenkyukal, Tokyo, Japan ,January 8, 2005, available at: http://www.hm-treasury.gov.uk/d/3-International_Workshop_A_Future_Climate_Change_Regime_and_Legal_Principles.pdf (accessed last: 131/01/09)

[461] UNFCCC Art. 3.1.

[462] See *World Commission on Environment and Development, Our Common Future*, 1978 and UNGA Res. 44/228 of December 22, 1989. See also IPCC Climate Change 2001: Working Group III: Mitigation, *Setting the Stage: Climate Change and Sustainable Development,* At "Introduction" available at http://www.grida.no/climate/ipcc_tar/wg3/050.htm

[463] See *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), Chapter I, and the *Declaration of the United Nations Conference on the Human Environment,* particularly at principles 8-15 available at http://www.unep.org/Documents.Multilingual/Default.Print.asp?DocumentID=97&Art.ID=1503&l=en (last accessed 03/08/08).

[464] Indeed, the idea of establishing UNEP was also a by-product of the Stockholm Conference. See the recommendations of the *Ibid.*, *convening of a second United Nations Conference on the Human Environment, Ibid.*, at: http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&Art.ID=1515&l=en . See also Strauss, A. L., *From Gattzilla' to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization,* 1998 J Int'l Econ. L. vol.1 19:3, 779.

[465] See Report of the UNCED*, supra,* n. 60.

[466] For a brief on Sustainable development, see *supra,* Chapter 4, Section 4.4.1.2. See also *IPCC Climate Change 2001: Working Group III: Mitigation, Setting the Stage: Climate Change and Sustainable Development.("Introduction"),* available at http://www.grida.no/climate/ipcc_tar/wg3/050.htm (last accessed: 30/06/09).

Commission became its household name, and became widely adopted by governments and academia. Subsequently, Principle 4 of Agenda 21 provides that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. [467]

SD has been a controversial concept, though.[468] Simply put, the principle is based on the understanding that rapid economic development of the industrialised world has exerted heavy pressure on the environment and the energy system. Industrialisation which was achieved through the use of fossil-based energy has led to the current state of global climate. That was because there were no environmental protection measures in place to mitigate the pressure. Then comes another circle of the process with the developing world now rapidly also industrializing using, mainly, the fossil-based energy sources. Therefore, in order to avoid the mistakes done in the past by the developed world, necessary environmental protection safeguards have to now be integrated in all economic activities both in the developed and developing world.

GPP is considered along the above line of thought. As governments spend large fortunes to acquire goods and services for governmental functioning which includes socio-economic development projects, emphasise or preference made in these purchases for climate friendly goods and services will help achieve the twin goals of governmental functioning as well as environmental protection. The WTO also recognised the potential of the principle of SD to serve as a tool with which to deliver development with the least harm to the environment. This is stated in the

[467] See Rio declaration, *supra,* n. 60.

[468] "Sustainable development" like "public policy" is an *unruly horse* which, if you get astride it, you never know where it will carry you".-borrowing from Burrough J. in *Richardson v. Mellish* (1824) 2 Bing. 229, 252 cited in Priaulx, N., *That's One Heck of an "Unruly Horse" Riding Roughshod over Autonomy in Wrongful Conception,* in Feminist Legal Studies Volume 12, No.3, January, 2004 available at: http://www.springerlink.com/content/w834641x5429/?p=14aef366040740a0801366bfe7bd9aa0&pi=0

Preamble to the WTO Agreement that pursuing trade liberalisation should take cognisance of the need to protect the environment and to promote SD.

4.4.3.2 The Precautionary principle

The foundation of policies and actions against climate change is precaution, in the sense of prevention of the occurance of future uncertain and irreversible effects. This makes the *precautionary principle* directly relevant to the current discourse. The principle implies that action should be taken to limit, regulate, or prevent potentially dangerous undertakings even in the absence of absolute scientific proof.[469] In practice, the principle means taking precautionary measures to prevent greater or uncertain harm. Such measures also naturally entail taking economic costs into account. [470] The principle which is now increasingly being recognized as a key legal principle in environmental law, in particular, and of international law in general[471] was first recognised by the UNGA in the World Charter for Nature adopted in 1982.[472] It was then re-affirmed as Principle 15 of Agenda 21.[473] This laid the ground for its prominence in the UNFCCC Art. 3.3, thus:

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[469] See, The European Environment Agency (Author), et al., The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings (Earthscan Ltd, London, United Kingdom, 2002), pp. 4-9. See also Park, Chris, Oxford Dictionary of Environment and Conservation, *supra,* n. at, p. 387.

[470] See Martin, P.H., *If You Don't Know How to Fix it, Please Stop Breaking it! The Precautionary Principle and Climate Change,* Foundations of Science, Volume 2, Number 2, 1997 , pp. 263- 292(30) (Springer 1997) Available at http://www.ingentaconnect.com/content/klu/foda/1997/00000002/00000002/00155949;jsessionid=1l6oe2gor9m8i.alexandra?format=print .

[471] There is of course a controversy on the actual status of precautionary principle, namely, whether or to what extent it has crystallized or been accepted as a principle of international (environmental) law. This controversy reflected especially in the *EC – Hormones* and *EC – Biotech* disputes. In *EC – Hormones*, for instance the AB in the *EC – Hormones,* the AB stated that "[T]he status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international *environmental* law." [Italics in the original]. See *EC – Hormones,* , Para. 123.

[472] See *World Charter for Nature*, Art. II:12(b) [UN A/RES/37/7 (48th plenary meeting, 28 October 1982)] Some commentators believe that precautionary principle was first recognized by this Charter See Faulkner, E. B. and Schwartz, R. J. (eds.) High Performance Pigments (Wiley VCH; 2 Revised edition (14 Jan 2009), p. 460. See also *Bodansky, D., .Deconstructing the Precautionary Principle,* in Caron, D. D. and Scheiber, H. N. (eds.), Bringing New Law to Ocean Waters, *(*381-91) (Koninklijke Brill N.V. The Netherlands © 2004), p. 386.

[473] See Rio Declaration, *supra,* n. 60. Principle 15 provides thus: "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."*

> The Parties should take *precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects.* Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. [Emphasis added]

In view of the scientific uncertainties which are still being investigated about its nature, impact and consequences,[474] climate change seems the best example for the application of the precautionary principle. Climate change, which is accepted as an issue of "common concern for mankind" and which requires the widest possible cooperation among nations, arguably fulfils the theoretical requirements set for the application of the precautionary principle. These theoretical requirements are embodied in the definition of the principle given at the 1998 Wingspread conference.[475] These are: (1) taking prompt preventive action even in the face of scientific uncertainty, (2) shifting of *burden of proof* and persuasion to proponents of potentially hazardous technologies,[476] (3) assessment of alternatives,[477] and (4)

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[474] Science is still uncertain as to the extent of the anthropogenic contribution to climate change, even as the IPCC seems more optimistic in its current findings. The uncertainties relate to "long time lags between forcings and response, the impossibility to test experimentally before the facts arise, and the low frequency variability with periods involved being longer than the length of most records." See Le Treut, H., (et al), *Historical Overview of Climate Change,* in Solomon, S. (et al) (eds.), Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 2007), pp. 119-121.

[475] This is the Science and Environmental Health Network conference at Wingspread in Racine, Wisconsin, 1998. See report of the conference entitled: *"The Precautionary Principle and Environmental Policy Science, Uncertainty, and Sustainability" by* Carl Smith at http://www.sehn.org/pdf/ppep.pdf

[476] This means, that rather the conventional approach in international environment law, which places the burden on the person *opposing* an activity to prove that it would harm the environment, the principle would reverse this burden and require the proponent of an activity to prove that it is safe. The onus is usually difficult to discharge, and this leads to a political decision to cancel the project. See Bodansky, D., *supra,* n. 479. See also, generally, *See* Peter H. Sand, *The Precautionary Principle: A European Perspective*, 6 Human & Ecological Risk Assessment 448 (2000) and also Verbruggen, H. And Kuik, O., *Environmental Standards in International Trade,* in Van Dijck, P. And Gaber, G. (eds.), Challenges to the New World Tarde Organization, pp. 265-290, Kluwer Law international, The Netherlands the Hague, 1996), p. 273. Applying the precautionary principle in the context of climate-friendly procurement, the current WTO jurisprudence is similar to the conventional international environmental law position. That is to say, a GPA Party adopting climate-friendly must *prove* the measure as being covered under the exceptions, and that is it *necessary* and not applied in a *discriminatory* manner (GPA Art. XXIII). However, applying the precautionary approach will mean to allow climate mitigation measure without asking for proof, as climate change has already been an established fact by sound science. Thus, any country that complains against a

transparency. [478] The principle thus calls for a greater sense of responsibility especially on the part of scientists whose explanations and analysis guide a political decision towards a precautionary action.

The precautionary principle, like the sustainable development principle, has also found expression in the WTO system. For instance, Art. 5.7 of the WTO *Agreement on the Application of Sanitary and Phytosanitary Measures* ("SPS Agreement")[479] allows WTO Members in an event of insufficiency of scientific evidence to "*provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information"*. The measures taken pursuant to this provision however should not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail, or constitute a disguised restriction on international trade.[480] The application of the principle was examined in *EC – Biotech.*[481] The arguments in this dispute surrounded the extent to which precaution qualifies as a principle of international law for the purpose of the Article 5.7 of the SPS Agreement.[482]

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climate-related measure should prove its "discrimination" or "protectionist intent" claims, or alternatively, that climate change state of the world is safe. See generally Chapter 7.

[477] This requires the adoption of best available and cost effective technology. See Bobansky, *supra,* n. 401 at p. 391.

[478] See *Ibid.* for further discourse on the theoretical foundations of the precautionary principle.

[479] WTO, *Agreement on the Application of Sanitary and Phytosanitary Measures,* opened for signature 15 April 1994, 1867 UNTS 493 (entered into force 1 January 1995), available at <http://www.wto.org>.

[480] SPS Agreement Art. 3.3. See also WTO Secretariat [Croome, J.], Guide to the Uruguay Round Agreements, (Klwuer Law International, 1998), pp 62-63. The principle of precaution as embodied in this Agreement has been attracting a lot of interest and scholarly commentary in the academia. E. g., Gruszczynsk, L., *The SPS Agreement within the Framework of WTO Law. The Rough Guide to the Agreement's Applicability*, Available at SSRN: http://ssrn.com/abstract=1152749 (June 28, 2008); Nupur, C., *Precautionary Principle in the SPS Agreement: Developing Disciplines and Practices* (SSRN, April 8, 2007).

[481] Reports of the Panel, *European Communities – Measures Affecting The Approval And Marketing Of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (29 September 2006).

[482] In the *EC- Biotech* dispute, the EU, based on precaution and pursuant to Article 5.7, placed a moratorium temporarily restricting the import of biotech products from some countries. The United States, Canada and Argentina complained before the WTO DSB against the EU. The EU argued that the moratorium would be justifiable as a precautionary measure, since precautionary principle was, in fact, an international law principle. The complainants on the other hand argued that precautionary principle had not

4.4.2.3 Avoidance of unnecessary restriction on international trade

Rather than pursuing their purpose through the use of trade measures against the parties or non-parties, as was the case in some earlier MEAs,[483] the UNFCCC and KP cautioned to the contrary. The UNFCCC thus requires that measures taken by the Parties to combat climate change, "including unilateral ones, should *not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade."*[484] These cautions are clearly the footprint of the earlier participation of the GATT EMIT group in the processes that led to the UNCED and the preparation and adoption of the UNFCCC. This is evidenced by the fact that these rather boilerplate provisions have always been in the GATT.[485] A more recent study[486] published jointly by UNEP and WTO, has discussed many of such climate-motivated potentially trade-restrictive measures, including GPP.[487]

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attained the status of an international law principle, but could at best be regarded as "an approach", and as such could not provide a justification for an SPS-inconsistent measure. The Panel accepted the complainants'' argument on that point. The AB ruling in *EC – Hormones* is to the same effect. See particularly, the EC's arguments relating to the precautionary principle (para. 16,), U.S.'s (para. 43) and Canada's (para.60). Then see the ruling on para. 236(c). So, in effect, while the precautionary principle is considered as part of the body of international law, its status is still uncertain, and the EC attempts to invoke the principle in *E.C.-Hormones* and *E.C.-Biotech* were not successful. See also Martin, M., *supra,* n. 29.

[483] The WTO has identified the UNFCCC and KP as among the fourteen out of about two hundred multilateral environmental agreements (MEAs) that used trade measures to pursue their objectives, and this approach would be problematic in the face of the WTO multilateral trading system (MTS). See WTO Secretariat, *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements,* (Revised 2005) (WT/CTE/W/160/Rev.3,TN/TE/S/5/Rev.1, 16 February 2005) at <www.wto.org>. See also Van den Bossche, Schrijver, N. and Faber, G. Unilateral Measures Addressing Non-Trade Concerns) (The Ministry of Foreign Affairs of The Netherlands, 2007) pp. xxxix-xl; 179-181.

[484] UNFCCC Art. 3.5 [Emphasis added]. And, the KP Art. 2.3, Parties included in Annex I should: "[s]trive to implement policies and measures *in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade.* [emphasis added]

[485] The most prominent being the text of the *chapeau* to the GATT Article XX as replicated in almost all the other WTO Agreement. See Appendix … for the texts of GATT Art. XX(b) and (g)

[486] WTO-UNEP, Trade and Climate Change (WTO, 2009). Other works on the linkages between climate change and trade rules include: in Cottier, T., (et al) (eds.) *supra,* n. 11. Chambers, W. B. (Eds.), Inter-linkages, WB, , *supra,* n. 450; Carraro, C. and Egenhofer, C. (Eds.) *supra,* n. 43 at 321; and Hufbauer, G. C., Charnovoitz, S. and Kim, J *supra,* n 25.

[487] Other such climate-related measures identified in the study include domestic measures (e.g., taxes on GHG emissions and emissions) and border measures (e.g. border tax adjustment).

Avoidance of unnecessary restrictions on international trade seeks to reinforce the sustainable development principle. It will be seen in chapter 5 how multilateral instruments and initiatives at global, regional and national levels that encouraged GPP also ended with the same caution. For example, para.13 of Agenda 21 called upon governments, specifically in the context of GP, to "review the purchasing policies … so that they may improve … the environmental content of government procurement policies *without prejudice to international trade principles"*.[488]

As the UNFCCC and KP however have empowered the Parties to take actions deemed necessary at domestic and international levels by which to pursue the objectives of the instruments, the question is to what extent could GPP be said to have the effect of restricting trade as described by Schoenbaum's treatise cite earlier[489] or in any other manner? It could be recalled that until 1981 when the Tokyo Round Procurement Code came into force, GP was not regulated. In other words, the GATT contracting parties were allowed to continue their discrimination and protectionism in GP.[490] But the reason for the caution against GPP being protectionist was that since GP was traditionally used for protectionist ends,[491] then GPP which seeks to pursue non-trade objectives may even be more prone to be used for protectionist purposes. It could indeed be used as a tool to protect local business thereby reversing the object of the WTO/GATT regulation of GP since the coming into force of the Tokyo Round code, and now the GPA. Indeed, the real problem with GPP, as Zhang and Assunção[492] warned, may be seen in the use of

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[488] See generally *supra,* Section 3.3. This was replicated in essence by WSSD Plan of Implementation under Chapter III 19(c). See also Arts. 10 and 69 of the UN guidelines for consumer protection 1999 which cautioned that due regard should be given to ensuring that government purchasing policies "do not become barriers to international trade and that they are consistent with international trade obligations." See also OECD *Environmental Strategy for the First Decade of the 21st Century,* part of the environment vision adopted by OECD Environment Ministers in May 2001.

[489] *Supra,* Chapter 2, Section 2.2.2.2.

[490] *Supra,* Chapter 3, Section 3.3.2.

[491] *Ibid*., Section 3.3.1.

[492] See Zhang, Z., and Assunção, L., *supra,* n. 149. See also Chapter 2, Section 2.2.3.

technical specifications in tender notices, which require specific standards for the products and services required for government purposes.

4.5 Summary

This chapter has indicated, following the IPCC works, that the complexity of the anthropogenic climate change including its global impacts, and the intricate relationship with the energy sector, provided the ground for the international community to design cooperative precautionary response strategies. This strategy resulted in the signing of the UNFCCC and the KP as the legal mechanisms to address the climate change problem. Pursuant to these instruments, countries formulated policies and measures at both international and domestic levels for cost-effective reductions in the GHG emissions that cause global warming resulting in the climate change. The various policy actions being taken to mitigate climate change at international level, as designed under the KP, including the Kyoto Mechanisms, could have potential effects on the countries' obligations under the WTO MTS. Actions at domestic level could even be more complex as are being treated already in other academic works. What remains, largely, to be treated in great detail, among the domestic policy options, is GPP, hence the subject of the next chapter of this study.

CHAPTER 5

GREEN PUBLIC PROCUREMENT, CLIMATE MITIGATION POTENTIAL AND THE TRADE - ENVIRONMENT DEBATE

5.1 Introduction

The objective of this chapter, broadly, is to provide a more detailed discussion on the evolution of the concept of green public procurement (GPP) and its processes, and then relate the GPP practice to climate change mitigation strategy. The chapter seeks to show that although the primary objective of procurement is to deliver what in economics is referred to as "value for money," GPP seeks to deliver value for money while at the same time improving the quality of the environment. And as, at times, environmental protection measures constitute non-tariff barriers to trade; this chapter examines the extent to which GPP in practice could raise issues with the GPA.

The chapter first traces the origin of GPP to the concept of sustainable development envisaged in the report of the 1972 UN Stockholm Conference on Human Environment (UNCHE) through the 1992 UNCED, and finally the World Summit on Sustainable Development (WSSD) and the Johannesburg Plan of Implementation. The aim of this historical overview is to establish how solidly founded is the concept of GPP as increasingly being adopted by multilateral institutions, regional economic organisations and national governments, and especially those committed to reducing GHG emissions under the climate change regime. This historical overview is followed by analysis to identify the nexus between GPP, climate change and trade regulation, and then with GPP in the context of trade-environment debate.[493]

[493] The Chapter thus does not attempt an economic evaluation of GPP as an environmental policy instrument or compare it with other environmental policy instruments. These issues are outside the purview of the thesis. For this, see for instance, Marron, D., *Greener Public Purchasing as an Environmental Policy*

The structure of the chapter is as follows: Section 2 gives a general description of the public procurement process and introduces GPP as sub-field of public procurement.[494] Section 3 proceeds with the nexus between GPP concepts and practices and climate change mitigation objectives. Section 4 then looks at the possible trade issues in green procurement. It highlights the fear of green procurement being used as a non-tariff barrier to trade. The issues raised in this section will serve as foundation for further analysis in the light of the WTO GPA in subsequent chapters. The last section concludes the chapter.

5.2 Procurement processes and the concept of GPP

5.2.1 An overview of the stages in public procurement process

GPP seeks to deliver one of the secondary objectives of public procurement, namely environmental protection for sustainable development. It has been noted in chapter 3 that generally, the objectives of public procurement are the same as those of private sector procurement. The same can also be said of their structure and procedure. The difference, if any, between public and private procurement process is the added responsibility of probity and accountability required of public procuring authorities that spend tax-payers' money,[495] in accordance with applicable public law.

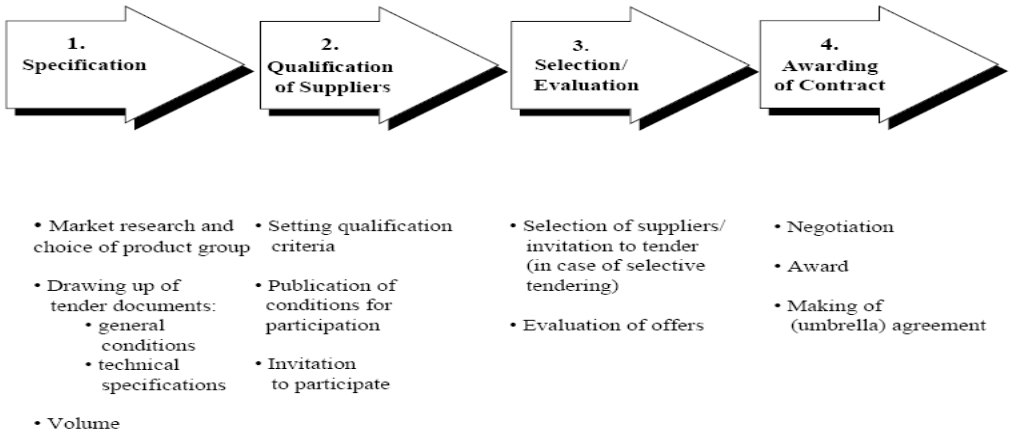
Instrument, in OECD, The Environmental Performance of Public Procurement: Issues Of Policy Coherence, (OECD, 2003), pp. 22-50.

[494] See Brander, L. and Olsthorn, X., *Three Scenarios for Green Public Procurement,* (Institute for Environmental Studies, Vrije Universiteit, The Netherlands, 2003), 3 available at: http://www.iclei-europe.org/fileadmin/user_upload/Procurement/RELIEF/Publications/IVM-paper_Procurement_scenarios.pdf (visited 22/07/08).

[495] EC, *Buying Green!, supra* n. 168, p. 12.

The GPA does not provide for the details of the conduct of procurement. Practice however indicates that public purchasing process involves typically four stages: (1) determination of the objective of the particular procurement, and identification and *specification* of the nature of the goods/services required to fulfil that set objective; (2) determination of what would be the minimum qualification for the prospective tenderer. This is particularly relevant to the case of "selective process" where the entity draws the tenderers from a list of pre-qualified suppliers based on specified qualification criteria; (3) evaluation of offers or bids based on specified award criteria, and (4), the awarding of the contract to winning tender. An outline of these stages could be found in an OECD study,[496] as are represented in the Figure 2 below:

Figure 2 stages in public procurement process



Source: OECD, 1999[497]

5.2.1.1 Defining initial procurement objective and subject-matter

The very essential first step in the public procurement process is the defining of the subject-matter and the objectives and requirements for the particular

[496] See OECD, *Trade Issues in the Greening of Public Purchasing,* OECD/TD/ENVIRONMENT(97)/111/FINAL, (Paris, 1999) p. 11, available at: http://www.oecd.org/dataoecd/17/7/39919037.pdf (last visited 12/03/08).

[497] *Ibid.*

procurement.[498] This understanding then leads to stage 1 above, which begins with market research[499] and choice of product groupings including price overview and sampling by window-shopping. This exercise may involve holding technical dialogue with targeted potential bidders. Notice of intention to engage in such dialogue may also be published to ensure more transparency.[500] The purpose of this exercise is to enable the purchasing entity to generate some idea of the availability and cost of the products or services, and of any available alternatives, for the purpose of inclusion in the tender document. It helps to target particular bidders while arming the procuring entity with the tool to demand and enforce its "value for money" strategy.

Pursuant to Art. VII:2 of the GPA this initial market research and technical dialogue should not in any way have the effect of precluding or distorting competition.[501] Similarly, the GPA transparency provisions require that technical specifications for the goods or services required form an integral part of the tender documents to be formally published.[502] These contain the general conditions of the contract as well. As will be seen later, the intention of a procuring entity to engage in green procurement must be indicated early enough and at this stage.

5.2.1.2 Drawing up of qualification criteria for the suppliers

This stage of the process sets the qualification criteria for prospective tenderers, and the manner they are notified. This stage is generally regulated by Arts. VIII and IX of the GPA. The cardinal rules in this regard are: Firstly, that any conditions set for participation in tendering procedures by suppliers shall be limited to those that

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[498] See ProInno Europe, *Guide on Dealing with Innovative Solutions in Public Procurement - 10 elements of good practice* [Commission Staff Working Document Sec (2007)] 280, p. 6.

[499] *Ibid.*

[500] *Ibid.*

[501] See also Recital 15 of *Directive 2004/17/EC* and Recital 8 of *Directive 2004/18/EC* as to technical dialogue.

[502] GPA Art. IX, Appendix II

are essential to ensure the firm's capability to fulfil the contract.[503] Secondly, such conditions must be transparent.[504] The first condition is *substantive,* defining the "what" of the rule, namely, the content of the supplier qualification conditions, while the second is *procedural*, specifying "how" those conditions are set and then communicated. The cumulative effect of these two rules is to ensure non-discrimination in the manner potential bidders are treated, thereby supporting the non-discrimination obligations provided for under GPA Art. III.

Generally, the tender documentation provided to suppliers "shall contain all information necessary to permit them to submit responsive tenders, including information required to be published in the notice of intended procurement."[505] This thus includes information on the economic and technical requirements, financial guarantee and the criteria for awarding contract. This provides another opportunity for procuring entities who aim to employ environmentally more conscious suppliers to insert relevant environmental qualifications in the notice, observing the above mentioned rules. Whether insertion of environmental considerations in the conditions of qualification of suppliers is acceptable under the rules is one of the issues to be determined.

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[503] GPA Art. VIII(b) states in part:

> In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:
>
> […]
>
> (b) any conditions for participation in tendering procedures *shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question.* Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of qualifications, *shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties….* [emphasis added]

[504] This rule relates to the procedure of notification of particular procurement to prospective bidders.

[505] GPA Art. XII:2

As for the procedural aspect or the rule, the notice of invitation is required to be published. The medium by which such invitation notice should be published are included in the Appendix II. As an essential requirement, the GPA Art. IX:11 provides that the notice of invitation should make it clear, in the publication in which it appears, whether the procurement in question is covered by the Agreement.[506] For this purpose, procuring authorities using selective tendering are required to publish once a year, in a publication indicated in Appendix III to the Agreement, their list of qualified suppliers, and to specify the period of validity of those lists and the conditions that need to be met for inclusion of interested suppliers in the lists.[507] In the EU for instance, the requirement to publish a notice is also governed by the public procurement thresholds, and should include a declaration that the entity's total annual expenditure for goods and services of a similar type exceed these thresholds.[508]

5.2.1.3 Evaluation and selection of offers based on award criteria

This stage evaluates and selects the suppliers that indicated interest to bid (as in Selective tendering method), or the tenders already submitted (as in Open tendering procedure). Thus the criteria used in the evaluation exercise are determined by the tendering method used. In the case of *Selective* tendering process, the procuring authority sends an invitation to tender to qualifying tenderers. In the *Open* tendering procedure, however, *evaluation* exercise is based on the qualification criteria published at the earlier stage.

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[506] Under the EU system, for instance, all contracts from the public sector which are valued above a certain threshold must be published in the Official Journal of the European Union (OJEU), available at http://www.ojec.com/Help/Help_OJEU.aspx (accessed 17/04/08).

[507] GPA Art. IX:9.

[508] See *European public contracts directive (2004/18/EC)* and *the utilities contracts directive (2004/17/EC)*. The current levels of the thresholds came into effect, from 1st January 2008. See also Tenders Direct at http://www.tendersdirect.co.uk/infoCentre/thresholds.aspx

Generally, in order to ensure non-discrimination and to prevent protectionist tendencies towards domestic products or suppliers, the GPA provides for the following criteria to be applied for evaluating and selecting tenders:

- the tenderers' capability (both technical and financial) to undertake the contract, and
- the lowest tender or the tender which in terms of specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous should be chosen.

Although there may be found minor variations, the above principles are largely found in all the public procurement policies.[509]

Indeed, under the EU new public procurement directives, for instance, contracts should be awarded not on the basis of lowest price consideration alone, but on whether it is the most economically advantageous tender, in view of a number of criteria linked to the subject matter of the contract. These criteria include: price, delivery date, running cost, cost effectiveness, quality aesthetic and functional characteristics, and technical merit as well as after-sales service.[510] Of particular interest to this study, environmental considerations are, since 2004, added criteria for the determination of the most advantageous tender under the said Directives.[511]

5.2.1.4 The awarding of the contract to winning tender

The last stage in procurement process is the award of the job to the winning contractor/supplier. In order to evaluate tenders leading to award of the contracting

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[509] GPA Art XIII. See also Simula, M., *Public Procurement Policies for Forest Products and their Impacts* (Draft Discussion Paper) (Food and Agriculture Organization of the United Nations, August 8, 2006) (available at: http://www.fao.org/forestry/webview/media?mediaId=11153&langId=1 accessed 12/05/05):

[510] See Section 6.4 for discussion on the EU New Public Procurement Directives, and the relevant case law.

[511] *Ibid.*

to a winning supplier, they have to first be "opened."[512] The GPA provides that all tenders solicited under open or selective procedures by entities shall be received and opened under procedures and conditions guaranteeing the regularity of the openings, and consistent with the national treatment and non-discrimination provisions.[513] As for the award, the GPA provides generally that awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation. The award is made to either the lowest tender or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be "the most advantageous."[514]

The phrase, "most advantageous tender", has not been defined in the GPA. Guidance is therefore sought from the EU public procurement law[515] where the phrase in the extended form of "most economically advantageous tender" has not only been interpreted but indeed received much attention in the case law. That attention came as a result of the up-surge in the demand for clarification as to the scope for inclusion of GPP objectives in the EU public procurement system. In short, the EU law allows contracting authority to include in the determination of economically most advantageous tender factors outside those usually related to the "value for money" concept. These may include environment-friendliness of the goods or services required, or the methods of delivery of services to be employed by the supplier.[516]

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[512] The "Opening" of tender is the process of receiving and opening the tenders for evaluation. For an example of this process see European Bank for Reconstruction and Development (EBRD), *Standard Tender Documents: Standard Tender Evaluation Format Procurement of Goods or Works 2005* at: http://www.ebrd.com/oppor/procure/guide/evalu.pdf. See also the Advanced Procurement for University and Colleges (Scotland) *Tender Opening Procedure (for hard copy tenders only),* at http://www.apuc-scot.ac.uk/home.htm.

[513] GPA Art. XIII:3

[514] *Ibid.* Art. XIII:4(b)

[515] The New Public Procurement Directives, *infra,* Chapter 6, section 6.4.1.3.

[516] See *infra,*, Chapter 6, Section 6.4

5.2.2 The concept and practice of green procurement

Having highlighted the stages in public procurement tendering process, the next pertinent question is, at what stage in the process does green procurement (GPP) feature? This section attempts to address that question starting with an insight into the concept of GPP.[517] GPP is a component of sustainable procurement, which in turn, has its roots in the concept of sustainable development. As a trade subject, this linkage will be followed in section 5.3 of this chapter with an analysis of the trade implications of green procurement under the WTO and GPA.

5.2.2.1 "Green" procurement and "sustainable" procurement: the roots

Governments use public procurement as a policy tool to address numerous other non-economic governmental policies,[518] including those related to sustainable development.[519] Climate change and energy security concerns, diffusion of innovation and technologies, and the concept of leading by example, are most prominent of these side-policy objectives. In this regard the UN defined *sustainable (public) procurement* (SPP) to include green procurement practices thus: it is "a tool which allows governments to leverage public spending … in order to promote the country's social, environmental and economic policies. SPP contributes to create markets for appropriate technologies and innovative solutions."[520] Indeed, 'Green

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[517] GPP under the United States' procurement system is referred to as environmentally preferable purchasing (EPP). See United States Environmental Protection Agency (USEPA), *EPA's Final Guidance on Environmentally Preferable Purchasing,* at http://www.epa.gov/epp/pubs/guidance/finalguidance.htm#GuidingPrinciple1 (last accessed 3/08/08).

[518] Arrowsmith, S., *supra*, n. 51.

[519] See Chapter 4 where it was also indicated that concern for global climate change, and the environment generally was not a new phenomenon. And, specifically, according to the IISD (International Institute of Sustainable Development), 1962 was considered by many as the "seminal year" which heralded the people's understanding of the close linkage between environment and development. That year, for the first time, an environmental book, Silent Spring, was published by Rachel Carson. This was a research on "toxicology, ecology and epidemiology". It suggested the catastrophic build up of agricultural pesticides, which was linked to the damage to animal species and to human health. It reversed the belief that the environment had an infinite capacity to absorb pollutants. See IISD, *Sustainable Development Timeline*, prepared by the IISD, 1972, at http://www.iisd.org/rio+5/timeline/sdtimeline.htm (accessed 27/07/08).

[520] See UNEP, Division of Technology, Industry and Economics, Sustainable Consumption & Production Branch, Sustainable Procurement, at http://www.unep.fr/scp/procurement/ (last visited 15/05/10).

Procurement', 'Sustainable Procurement', "Ethical Procurement" and Social Procurement", are commonly used "to link the whole procurement process within the business to more environmentally sustainable or more socially equitable practices."[521] GPP is thus an aspect of a broader environmental protection and sustainable economic development policy. By definition, GPP requires public procurement authorities to integrate, in a systematic manner, environmental … factors and considerations into all procurement processes " - whether purchasing goods, services or works –from defining the true needs, to setting appropriate technical specifications and evaluation procedures, to monitoring performance and results."[522]

Incorporating environmental considerations in public procurement, and the debate surrounding it, however, according to McCrudden,[523] is a recent phenomenon.[524] This development is being driven, in part, by the development of the concept and practice of the sustainable development principle, and, in part by the growth of awareness by the private sector of the potential to use green procurement as a tool for the observance of their corporate social responsibilities (CSR).[525] Agenda 21

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[521] A research report entitled *Sustainable Development: a Review of International Literature* was sponsored by Scottish Executive Social Research 2006, pages 3 and 49, available on the Scottish Executive Social Research website at: http://www.scotland.gov.uk/Publications/2006/05/23091323/17 [last accessed 15/05/10].

[522] ICLEI (International Council for Local Environmental Initiatives) (Local Governments for Sustainability), Procura+ Manual: A Cost-Effective Sustainable Public Procurement (2nd Edition), (ed. Clement, S.) (ICLEI, Freiburg, Germany, 2007), p. 8. See also: Brander, L. & Olsthoorn, X., *supra*, 494, p. 13; Bolton, P., *Protecting the Environment through Public Procurement: The Case of South Africa,* Natural Resources Forum 32 (2008) 1–10 at p. (available at: http://www.blackwell-synergy.com/action/showPdf?submitPDF=Full+Text+PDF+%28122+KB%29&doi=10.1111%2Fj.1477-8947.2008.00171.x&cookieSet=1 (accessed 07/06/08). See also generally McCrudden, C., *Using public procurement to achieve social outcomes*, Natural Resources Forum, 28 (2004): 257–267, p. 1.

[523] McCrudden, C, Buying Social Justice -Equality, Government Procurement & Legal Change, (Oxford University Press, 2007).

[524] *Ibid.* pp. 390-391.

[525] *Ibid.* at pp. 365-389. This work has treated extensively the linkage arguments between public procurement as a trade policy tool and the three "core areas" of corporate social responsibility (CSR), namely, human rights, labour standards and environmental practices.

under paragraph 23 called upon governments to use their vantage position to influence markets in their procurement policies, thus:

> Governments …particularly in countries where the public sector plays a large role in the economy and can have a considerable influence on both corporate decisions and public perceptions… should …review the *purchasing policies of their agencies and departments* so that they may *improve, where possible, the environmental content of government procurement policies*, without prejudice to international trade principles.[526] (Emphasis added)

In the same vein, chapter III.19 the World Summit on Sustainable Development (WSSD) Plan of Implementation adopted at Johannesburg in September 2002 reiterated the need to take sustainable development considerations into account in public procurement and to "promote public procurement policies that encourage development and diffusion of environmentally sound goods and services".[527]

Thus, pursuant to the sustainable development principles, the public sector demands more GPP from the private sector suppliers of goods and services. The private sector responds by increasingly incorporating the GPP whether as a matter of legal requirement, or as a CSR package. This research however, is concerned with public procurement as a required by the regulator. Suffice it to mention here that the CSR tends to narrow the divide, and to intersect between the public and private procurement, thereby bringing the government and the private sector into closer partnership. This enhances government's services delivery in the areas of

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[526] http://www.gdrc.org/u-gov/a21-consum-patterns.html

[527] See Johannesburg WSSD Plan of Implementation, 2000 Chapter III.19(c), the UN Department of Economic and Social Affairs, Division of Sustainable Development, at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm (accessed 27/07/08). The comments of the ex officio Vice-President of the Summit (A/CONF.199/16/Add.1) on the partnership plenary meetings on water and sanitation, energy, health, agriculture and biodiversity (WEHAB) also noted the potential of local authorities to promote green procurement policies so as "to push industries to produce in environmentally friendly and fair manners." See http://daccessdds.un.org/doc/UNDOC/GEN/N02/636/93/PDF/N0263693.pdf?OpenElement para. 6 (42) on Energy.

sustainable development, while also delivering benefit to the market, as well as the business community's CSR. And as GP is a subject of trade, the same chapter cautioned that whatever environmental protection and sustainable development strategy is adopted within the procurement process, it should be pursued inter alia "without distorting international trade".[528]

In recognition of the value of GPP, the United Nations and its agencies, multilateral development and financial institutions, and inter-governmental and non-governmental organisations including the WB, OECD, took steps to promote green and sustainable procurement.[529] They first incorporated sustainable procurement in their manual of internal operations, and propagated its ideal in their international programmes and in their relationship with other clients and stakeholders. The said institutions and organisations in 2001 formed an *Interagency Sustainable Procurement Group* called the Environmentally and Socially Responsible Procurement Working Group whose objectives include the promotion of green procurement practices in their internal operations as well as identifying "new sustainable procurement partners in developing and developed countries".[530]

5.2.2.2 Green procurement in practice: the 3 elements of GPP

GPP in practice starts at the very moment the need for a particular procurement arises, and continues throughout the process. GPP thus, "does not seek to re-write

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[528] *Ibid.*, Chapter III.19(b). Safeguarding international trade regulations is one of primary concern to this research. This is addressed in Section 3 of this Chapter, and more specifically in Chapters 6, 7 and 8.

[529] Multilateral institutions and organisations, indeed, are big spenders to run not only their headquarters but also their out-reach-offices, and their operations especially in developing countries. For instance, the UNDP Human Development Report 1998 found that the United Nations alone bought "nearly $4 billion worth of goods and services in 2000." Such expenditure, if channelled towards greener goods and services could make a huge difference in their operations, as well as kick-start sustainable market and consumption habits in the developing countries. See Mastny, L., *Purchasing Power Harnessing Institutional Procurement For People And The Planet* (Thomas Prugh, *Ed.)* (WorldWatch paper 166, July 2003).

[530] See more from the group's website at: (http://www.sustainableprocurement.net) (visited 20/07/08). The group also sees sustainable procurement in a much broader context, which, in addition to the environmental aspects of procurement also includes consideration of recurrent concepts and initiatives of poverty eradication, international equity in the distribution of resources, labour conditions and human rights.

the book on procurement."[531] The *green* aspect simply seeks to "add an environmental dimension to the decision-making process,"[532] which is thus "seen as part of the 'quality' criterion."[533] Indeed, the standard "value for money"[534] criteria used in public purchasing, which consist traditionally of lowest price, best quality and availability, still are the cornerstone of GPP. The GPA currently does not explicitly provide for GPP considerations in outlining technical specifications. GPA provisions thus apply to ensure that GPP processes are not discriminatory or trade restrictive.

Going by the definition and practice of GPP in the preceding section, there emerge three elements of green procurement activity. These are: (1) the purchaser, (2) the green goods and services, and (2) the supplier. Below is a brief on the elements of green procurement:

a) The Purchaser:

The purchaser in GP generally is "the government", or a public authority or entity charged with the responsibility to make purchases for or on behalf of government or any of its departments or units. The "purchaser" should be "an entity covered" by the GPA.[535] Covered entities are required to be specified and listed in Appendix 1 of each Party's schedule of commitments.[536] Parties could modify and up-date their commitments in the schedules by adding to, or removing from the list, any entities in the annexes.

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[531] Global Development Research Centre (GDRC), "*A Quick Introduction to Green Procurement,*" available at: http://www.gdrc.org/sustbiz/green/doc-proc_introduction.html (last visited 25/08/08).

[532] *Ibid.*

[533] *Ibid.*

[534] On the concept of value for money, see *supra,* Chapter 3, Section 3.2.3.1

[535] See GPA Art. 1.

[536] See GPA Art. 1 Footnote 1, *supra,* Chapter 3, Section 3.2.2

The significance of including the entities in the annexes has been underlined by the *Korea – Procurement* ruling.[537] In this case, the US laid a series of complaints of protectionist attitudes against Korea in its (Korea's) procurement, for the construction of the Korea International Airport. To sustain an allegation of protectionism against a particular procurement exercise, the complainant must first establish that the entity that undertook the procurement was in fact a "covered entity" within the meaning of Appendix 1 Art.1 of the GPA. That is to say the entity has been listed in Annexes 1 to 3 of Appendix I relating respectively to "central government entities," "sub-central government entities" and "other entities". The Panel in this case found that the Korean entity that undertook the procurement was not a "covered entity" under the GPA, and as such the US could not sustain the complaint against Korea.

It is also pertinent that the purchase is for non-commercial purposes of governmental functions. If the government is buying the goods or services for the purpose of, or "with a view to commercial resale, or with a view to use in the supply of services for commercial sale",[538] then it is not government procurement covered under the GPA. Such procurement should be covered by the GATT or GATS.

b) The Supplier

The supplier is the second pillar or element in GPP. The supplier is the contractor, bidder, or tenderer that responds to government's invitation to tender or bid for the goods or services required. The national treatment obligation under Art. III of the GPA prohibits discrimination between domestic and foreign suppliers who are Parties to the GPA. In the same vein, by MFN obligation, discrimination is prohibited

[537] *Korea –Procurement, supra*, n. 198, para. 7.6.

[538] See *supra,* Chapter 3 Section 3.3.2.1 on the exclusion of GP from the regulation of GATT and GATS. See also *Presidential Candidates' Key Proposals on Health Care and Climate Will Require WTO Modifications Overreach of WTO Highlighted by Potential Conflicts with Candidates' Non-Trade Proposals,* pp. 9-10 (Public Citizen's Global Trade Watch, Washington, DC, USA, February 2008), available at: http://www.citizen.org/documents/PresidentialWTOreport.pdf (accessed last: 07/10/08).

in the treatment given to foreign suppliers bidding in the domestic market of the procuring entity. Generally however, procuring authorities are to ensure, in setting conditions for supplier qualification that:

> "[a]ny conditions for participating in tendering procedures shall be limited to those which are essential to ensure the firm's capacity to fulfil the contract in question."[539]

Pursuant to this provision therefore, procuring entity must ensure that suppliers are not excluded for reasons otherwise than their ability to perform the particular contract in question. "Ability" is determined in terms of technical and commercial/financial capacity of the supplier to perform the contract. Thus, while, arguably it is permissible for procuring entity in GPP to require from the supplier evidence of technical qualification and historical performances (past projects) to show its technical capability, it is debatable if evidence could be required of supplier's general environmental management qualification, including ISO EMAS certification.[540] This research however will suggest, for the purpose of climate change objective of particular procurement, that the procurement entity should demand evidence of supplier's climate change mitigation credentials or inclinations.

c) The green products and services: the Doha Negotiations

Governments seek to use government procurement as a channel for diffusion of climate change mitigation goods and services.[541] For effective GPP, therefore the purchasing entity should be conversant with the attributes of the "green" products

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[539] GPA Art. VIII:(b)

[540] See Kunzlik, *International Procurement Regimes*, *supra*, n. 170, p.119, 123. See also *Kippo-Edlund, P., et al, Measuring the Environmental Soundness of Public Procurement in Nordic Countries,* (Nordic Council of Ministers, Copenhagen: 2005), p. 13. Under the EU law on public procurement, it is considered that because they are "tailor-made" contents of the environmental programmes and environmental management schemes may differ in their contents from supplier to supplier. Thus it will be impossible to say generally that EMAS should be required as evidence of technical capacity to qualify for tendering. See more on this in Chapter 6, Section 6.4.

[541] See also Cosbey, A. (Ed.). *Trade and Climate Change: Issues in Perspective.* (ICTSD/International Institute for Sustainable Development, 2008), p. 1.

and services to be procured.[542] These attributes should be explicitly communicated to the suppliers. This is also part of the transparency requirements of the GPA.[543] These attributes are usually inserted in the "technical specifications" as well as "award criteria" sections of the tender notice. It is therefore essential to have a common understanding of what constitutes *green* products and services otherwise known as environmental goods and services (EGS)[544]. This common understanding is essential not only as between the procuring authorities and the suppliers, but indeed between countries at multilateral level. This is because, to date, there exists no comprehensive or common understanding or classification of what should be regarded as EGS.[545]

The need to have a common view of what constitutes EGS [and the sub-category of climate change goods and services (CGS)] emphasizes the importance of the current WTO round of multilateral trade negotiations, namely, the Doha Round. Liberalisation of EGS has, for the first time been on the WTO negotiating agenda under the Doha process. These are a part of the negotiations for market access of non-agricultural goods, which take place in the Negotiating Group on Market Access (NGMA).[546] In relation to services, negotiations are held under the auspices of the Special Sessions of the Council for Trade in Services (CTS). The Committee on

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[542] Teresa, J. E. I. S., *Base Implementation of Executive 13101: Buying Environmentally Preferable Products and Services*, (Thesis submitted to George Washington University Law School, July 2000, 29, available at http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA388232&Location=U2&doc=GetTRDoc.pdf (visited on 14/07/09).

[543] See Chapter 3, Section 3.4.1.2.

[544] Also referred to as environmentally preferable goods and services (EPG), following from environmentally preferable purchasing, the usage in the North America.

[545] See Chaytor, B., *Negotiating Further Liberalization of Environmental Goods and Services: An Exploration of the Terms of Art* , RECIEL 11 (3) 2002., 287

[546] See WTO, *A simple guide — NAMA Negotiations* at http://www.wto.org/English/tratop_e/markacc_e/nama_negotiations_e.htm See general appraisal of the EGS negotiations institutional issues in WB, International Trade and Climate change, *supra*,, n. 63, pp. 73-96. For more analysis on the complexities of the EGS negotiations and their potential to help towards realisation of the United Nations Millennium Development Goals, see Cottier, T., Sharon, D and Pinhao, B., *The WTO Negotiations on Environmental Goods and Services: A Potential Contribution to the Millennium Development Goals* (UNCTAD, Geneva, 2009).

Trade and Environment (CTE[547]) (Special Sessions) monitors the role over progress in the EGS negotiations and in particular, their definitional aspects and scope.

Progress has been hampered partly by this definitional uncertainty of the EGS which, arguably, was created initially by the language of the Doha Ministerial Declaration (DMD) itself. The DMD gave the mandate for the accelerated liberalization of the EGS. Paragraph 31(i), (ii), and (iii) of the DMD instructs members to launch negotiations on the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services "[w]ith a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services"[548] It stopped there without defining the goods or services as the subjects of the liberalisation sought.

And indeed no such definitions of EGS are available even in the GATT on the goods aspect of the negotiations, nor in the GATS on the services aspect. GATT has used the term "products" which for practical purposes would be synonymous to "goods". As for "services", Art. I(2) of the GATS, merely defines "trade in services", and this is by reference to supply of the services in question to the consumer. Thus the AB in *EC - Bananas III*[549] noted, in line with GATS Art. I:1, that GATS applies to measures by Members "affecting" trade in services. That is to say measures broadly having "an effect on" services. And by virtue of Art. I(3)(b), "services" includes any service

[547] For a brief on the establishment of the CTE, see *supra,* Chapter 2, Section 2.2.2.3.

[548] See WTO, *Elimination trade barriers on environmental goods and services,* at www.wto.org/english/tratop_e/envir_e/envir_neg_ser_e.htm (last visited 29/03/09)

[549] see *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (EC – Bananas III), (WT/DS27/AB/R) (hereinafter, "*EC –Bananas III")*

in any sector except services supplied in the exercise of governmental authority.[550] Further, GATS Art. XXVIII(b) provides that the "'Supply of a services' includes the production, distribution, marketing, sale, and delivery of a service."[551]

Thus "services" is an activity, or a series of activities, that goes with related goods or other services. At times, however, goods/products and service are interwoven to the extent that an adjudicating body will need to analyse and apply both the GATT and GATS simultaneously in order to sort out the issues in a particular dispute.[552] With this void, created by the mandate itself, negotiating parties had to introduce start-up strategies which are presented here in brief thus:

i) The List Approach:

The OECD proposed a *list approach* by which they presented lists of *industrial products* for inclusion in the negotiating agenda for tariff elimination of reduction in line with the mandate. The products in the lists consisted of "technology input in fields such as sewage, clean water, climate change, noise abatement, and renewable energy."[553] This approach was supported by industrial nations.[554] A corollary list was proposed by UNCTAD ostensibly to serve the developing country interests. This proposal consisted of defining a list of environmentally preferable products (EPPs) for the purpose of lowering or eliminating tariffs. The products suggested under this list, in view of both their nature and PPMs, are beneficial to the environment and potentially will serve sustainable development ends. The products include non-timber forest products such as jute and coir, eco-labelled products,

[550] This means the exclusion of the application of GATS to the services where the GPA is the appropriate regulatory instrument.

[551] *EC –Bananas III,* supra, n. 549, para. 220.

[552] *Ibid.* para. 221.

[553] *Ibid.*

[554] See submissions by Submission by the United States, TN/TE/W/52 T, TN/MA/W/18/Add.7, 4 July 2005; Submission by the European Communities, TN/TE/W/56, 5 July 2005.

organic agricultural products, and biofuels such as ethanol and bio diesel. This proposal was endorsed by some industrialised countries too.[555]

ii) The Project Approach

The *Environmental Project Approach* (EPA), proposed mainly by India,[556] and supported by many developing countries envisages an environment and sustainable development-motivated project in which goods and services would be required. These would then be eligible for preferential market access facilitation during the implementation of the particular project. This project will be "defined by national governments through a Designated National Authority (DNA), within parameters to be negotiated within the WTO Committee on Trade and Environment Special Session (CTESS)."[557]

iii) The Integrated Approach

This represents a combination of elements of both the *list* and *project* approaches earlier described. This proposal was initially tabled by Argentina.[558] Under this proposal specific environmental projects will be identified by the CTE (Special Session). Goods and services required to execute these projects will automatically be included in the list so that preferential market access is accorded both the project and the accompanying goods and services. The list may be amended and/or updated periodically through negotiations.

All of these proposals and the lists have been the subject of heated controversies among Members, indicating just how notoriously problematic the concept of EGS is

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[555] See submission by Switzerland: Switzerland, TN/TE/W/57, 6 July 2005].

[556] See Submission by India, TN/TE/W/54, 4 July 2005

[557] Cottier, T. (et al) (eds.), *The WTO Negotiations on Environmental Goods and Services, supra,* n. 546.

[558] See Submission by Argentina, TN/TE/W/62, 14 October 2005.

in trade regulation.[559] This research will not delve into those controversies. Suffice it to say that these negotiations are an opportunity to be utilised for multiple benefits, namely, for the environment and climate change, while serving the acclaimed foundation of the Doha round itself, namely, development.

5.2.2.3 The emerging concept of "climate-friendly" goods and services

It is to be noted that it is out of the lists mentioned earlier that a sub-category of EGS has emerged, namely, the climate-friendly goods and services (CGS).[560] This study sees this approach as innovative, which should also be pursued and consolidated at the Doha process. CGS, for the purpose of this research, are EGS whose manufacture and use generally results in less GHG emissions than their alternatives. Also, the IPCC has identified a range of such mitigation and adaptation technologies, programmes and projects that can assist in addressing the challenge of climate change.[561] These can conveniently be included under this sub-category. The WB in a recent work on *international trade and climate change*[562] has identified some 43 items that could be included in this sub-category.[563] Similarly, in a more recent study[564] on *climate-related single-use environmental goods* conducted under the auspices of IISD has focused extensive discussing on a few items under this sub-category. These are Wind Turbines, Solar Cells and Panels, Solar Water Heaters, Biofuels, Hydraulic Turbines, Building-Insulation Products, Efficient Lighting, Heat Pumps, Control Equipment, Electric Cars.[565] These CGS lists could

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[559] See Sampson, G. P., World Trade Organisation and Sustainable Development, United. Tokyo, JPN: Nations University Press, 2005. p. 63

[560] However, from technology aspect of the CGS, there are various other terms used in the global discourses to denote technologies that help in mitigating climate change impacts. The WB project has mentioned these to include: "'environmentally sustainable technologies," "environmentally sound technologies," "sustainable energy technologies," "clean energy technologies".

[561] See for instance IPCC, AR4 Working Group III, available at: http://www.ipcc.ch/publications_and_data/ar4/wg3/en/ch9s9-5-2.html [last visited 15/05/10].

[562] WB, International Trade and Climate Change, *supra,* n. 63.

[563] The list of these items is attached as Appendix V hereto.

[564] Vossenaar, R., *Climate-related Single-use Environmental Goods,* ICTSD Issue Paper No. 13, International Centre for Trade and Sustainable Development, Geneva, Switzerland (2010).

be harmonised and agrred upon by GPA Parties and then targeted as subject of preferential climate-friendly procurement. In this regard, the EU and the US in December 2007 made a submission at the negotiations proposing that priority be given to CGS linked to addressing climate change.

With this recognition of specific CGS out of the larger grouping of EGS, this lends support for the proposition of this research that climate change challenge should be given a separate treatment among the multifarious trans-boundary environmental problems. CGS currently comprise about one-third of the EGS already identified by a group of delegations.[566]

For practical purposes, as stated earlier, this carved out CGS list could be "agreed upon" by the GPA members and then attached as either an appendix or a reference paper to the GPA. The idea is to allow for Parties wishing to embark upon climate-motivated to do so ensuring that their subject-matter of the procurement could be related to items included in the Appendix or reference list. The list could, in line with the third negotiating proposal for EGS, namely, project-based, could include projects. And for this purpose, as suggested by Cottier,[567] projects ordinarily eligible for CDM listing could automatically fit into this concessional procurement list of the GPA.

Thus, the pre-determination of what constitutes climate friendly goods and services serves the following objectives:

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[565] Ibid., pp. 14-23.

[566] See WTO, *The multilateral trading system and climate change,* at http://www.wto.org/english/tratop_e/envir_e/climate_change_e.pdf (last visited 15/05/10).

[567] Cottier, T., commenting after the author's presentation, at the *NCCR Annual Conference And Site Visit,* WTI, Bern, Switzerland, July, 5 2009.

I. It makes it easier for both the procuring authority to identify or verify the products and services in the particular green procurement as climate friendly.
II. It affords the procuring authority an opportunity to seek legal justification for the procurement as being *prima facie* motivated by climate change concerns
III. It makes it easier for suppliers to supply what is clearly already identified through the indicative list. This makes a good case for transparency in government procurement.

With the stagnation of the Doha negotiations now, and in order to facilitate some progress especially in the area of climate change mitigation aspects, the WB list of CGS designation can be endorsed at the WB members' level, so as to serve as a guide for international standardizing bodies and in formulating national technical regulations. The list can even serve as the basis of what could be included or acceptable as climate-friendly goods and services.[568]

While hopes are still being entertained for the resuscitation of the Doha negotiations, one may take a quick look at an example of GPP practice of the Swedish International Development Cooperation Agency (SIDA).[569] SIDA defines green goods broadly as those "manufactured using renewable products … or using non-renewable products in a sustainable manner." Their essential characteristics include that in their manufacture, use and disposal no harmful emissions are occasioned.[570] These will be the main considerations in setting the technical specifications as well as evaluation and selection criteria for green products and

[568] Perhaps, the final determination by the Doha Round negotiations of what should constitute EGS for the purposes of tariff concessions will be relevant also in formulating technical specifications in other aspects of green procurement. The relevance of these negotiations is considered in the next Section on this Chapter.

[569] Sida's Policy for Green Procurement, Swedish Department for Natural Resources and the Environment: September, 2002), p. 5. See also para. 2.8 (Green Procurement – Environmental considerations) in Sida's Procurement Guidelines, 2004, available at http://www.sida.se/Global/Partners/Procurements/SidaPolGreenProc.pdf (last visited: 13/06/10)

[570] *Ibid.*

services. Generally the criteria, using whole-life cycle assessment (LCA) approach cover that whole-life cycle of the goods and services to be purchased. An LCA assessment of a product, services or process seeks to evaluate environmental effects of the product, process, or activity in a holistic approach. It looks at the entire life cycle of the product or process from raw materials extraction through consumer use to disposal the so-called "cradle to the grave" assessment approach.[571] The figure below represents the stages of a product life-cycle: (1) material extraction, (2) material procession including recycling, (3) manufacturing/re-manufacturing, (4) use/re-use and (5) waste management which including reuse and disposal.

Thus, green products and services include the products or services themselves and their PPMs, as well as considerations of the product's environmental safety on disposal. It may also include consideration of the energy saving that may result from the re-usability or even re-manufacturability of the product. This therefore re-emphasises the PPMs-related legal problems under the trade law. These problems and possible solutions are the subject-matter of discussions of chapters 6 and 7.

5.3 Government procurement as climate change mitigation measure

GPP, the focus of this research falls under environmental protection of these non-trade concerns. Indeed, energy efficient GP was identified by the IPCC as an "environmentally efficient" policy tool to address climate change.[572] Thus, countries started to implement GPP as domestic compliance measure to help address climate

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[571] U.S. Congress, Office of Technology Assessment (OTA-E-541), *Green Products by Design: Choices for a Cleaner Environment*. U.S. Congress, Office of Technology Assessment, (September 1992) available at http://www.srl.gatech.edu/education/ME4171/OTA-GreenProducts.pdf (accessed 27/10/08).

[572] See IPCC, Levine, M., D. Ürge-Vorsatz, K. Blok, L. Geng, D. Harvey, S. Lang, G. Levermore, A. Mongameli Mehlwana, S. Mirasgedis, A. Novikova, J. Rilling, H. Yoshino, 2007: Residential and commercial buildings. In *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental* Panel *on Climate Change* [B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds.)], Cambridge University Press, Cambridge, United Kingdom, pp. 428-429, available at http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4-wg3-Chapter6.pdf. (Last accessed 15/05/09).

change. Hence, discussions here will be devoted to GPP as a climate change mitigation measure.

5.3.1 GPP as a domestic compliance measure

In order to effectively address the climate change challenge, and also to meet their commitments under the Protocol, Annex I Parties must put in place *domestic policies and measures*.[573] The Protocol thus called upon the Annex 1 countries to:

> "… strive to implement policies and measures [to combat climate change] under this Art. *in such a way as to minimise adverse effects, including the adverse effects of climate change, effects on international trade,* and social, environmental and economic impacts on the parties, especially developing country Parties."[574]

The Protocol further provided for an indicative list of the "policies and measures" that might be adopted by the Parties pursuant to the above provision, and so as promote sustainable development. It requires each Annex-I Parties to, inter alia:

> (a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:
>
> (i) Enhancement of energy efficiency in relevant sectors of the national economy
>
> (iv) Research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies. [575]

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[573] See http://unfccc.int/essential_background/kyoto_protocol/items/3145.php (visited last 27/01/06).

Kyoto Protocol Art. 2:3. [Emphasis added]

[575] *Ibid.*, Art. 2.1(a)

It is clear from the above provision that countries are not instructed to implement any specific type of measure.[576] Parties are thus free to enact those measures, or a combination of measures deemed appropriate to meet their GHG reduction commitments. Pursuant to the above mandate the Parties especially the OECD member countries have engaged in a number of actions and policies to mitigate climate change. They use the so-called "portfolio approach", using multiplicity of relevant sectors and actors involved in the energy, environment and trade arenas. One of the most effective courses of action suggested as part of the solution to climate change is recourse to human ingenuity and creativeness which, rather paradoxically, "got us into our greenhouse mess".[577]

If utilised effectively, GPP can engender innovation in new technology and modes of production thereby complementing other policies targeted at climate change mitigation and adaptation programmes.[578] Thus, many of the UNFCCC Annex I parties have incorporate GPP within the overall climate change and energy policy package.[579] The drive to local innovation[580] in the long run will translate into financial

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[576] Palmer, A. and Tarasofsky, R., *The Doha Round and Beyond: Towards a lasting relationship between the WTO and the international environmental regime, (*Chatham House: 2007) pp. 9-10 (available at: http://www.chathamhouse.org.uk/files/3397_wtomea0207.pdf

[577] Henson, R., The Rough Guide to Climate Change: The Symptoms, The Science, The Solutions, (Penguin Books, London, UK: 2008), p. 306.

[578] *Ibid.*. See also WB, International Trade and Climate Change, *supra,* n. 63, pp. 47-72.

[579] See *Commission of the European Communities COM(2005) 488 final* (Brussels, 12.10.2005): *Implementing the Community Lisbon Programme: Communication From The Commission To The Council, The European Parliament, The European Economic And Social Committee And The Committee Of The Regions, More Research and Innovation - Investing for Growth and Employment: A Common Approach,* available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0488en01.pdf (accessed last: 29/08/08), P. 8. See also EC, *Guide on Dealing with Innovative Solutions in Public Procurement*: *10 elements of good practice* (Commission Staff Working Document), SEC (2007) 280, p. 3 (available at: http://www.proinno-europe.eu/doc/procurement_manuscript.pdf). See also, for example, Cosbey, A., Ellis, J., Malik, M. and Mann, H., *Clean Energy Investment Project synthesis report*, (International Institute for Sustainable Development (IISD) IISD, 2008) available at: http://www.iisd.org/pdf/2008/cei_synthesis.pdf (accessed last 09/10/08); *Global Clean Energy Investment Overview Trends and Issues in the Financing of Renewable Energy and Low-Carbon Technology* (Prepared for the Clinton Global Initiative New York, 20-22 September 2006), (New Energy Finance Limited, London, UK, 2006), available at: http://www.clintonglobalinitiative.org/NETCOMMUNITY/Document.Doc?&id=42 (accessed last 09/10/08); *UK–India Collaboration to Identify the Barriers to the Transfer of Low Carbon Energy Technology Final Executive Summary,* p 7, (Institute of Development Studies at the University of Sussex, Brighton, UK and Department for Environment, Food and Rural Affairs, 2006), available at

savings, while achieving local environmental, social and health goals which are all associated with global sustainability.[581] Through GPP, Parties aim also at directing their expenditure and power towards encouraging investment in and innovation of new cleaner technologies for both products and services, and production processes that are more climate-friendly.[582]

Ultimately, these climate-friendly technologies as manufactured en mass could reduce pressure on the climate system by the reduced GHG emission resulting from both their production and usage. Therefore, the massive capital spending in government purchases pursuant to this objective could well be targeted in the

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http://www.ids.ac.uk/UserFiles/File/poverty_team/climate_change/UK_India_TT_exec_summ.pdf (visited last 09/10/08).

[580] See *National Workshop on Greener Government Purchasing: Workshop Proceedings*. Government of Canada, November, 1996. See also UNCTAD, *World Investment Report 2010 (WIR 2010),* p. 128, *available at*: http://www.unctad.org/Templates/WebFlyer.asp?intItemID=5539&lang=1.

[581] See Clement, S., et al, The Procura+ (Manual: A Guide to Cost-Effective Sustainable Public Procurement) (2nd edition) (ICLEI European Secretariat, 2007) at p. 9. See also UN, World Economic and Social Survey 2009: Promoting Development, Saving the Planet (Department of Economic and Social Affairs of the United Nations Secretariat, 2008), p.116.

[582] There have been some success stories in this regard. For example, it is mentioned in a report prepared by the Commissioner of the Environment and Sustainable Development, Canada, that government as major buyer could and did indeed stimulate "a greener marketplace" in Canada. This was seen when "a few years ago" book publishers in Canada had to pay high premium to get recycled papers for their printing business. However, this action stimulated debate, and with campaigns by an environmental organization, a number of other publishers started demanding for such papers. In the end, the demand was high and this prompted numerous Canadian pulp and paper companies to develop "ancient forest friendly" papers for books. The story ended by mentioning that it was the success in Canada that stimulated similar initiatives in the U.S. and Europe. Another example cited is that of IKEA, a furniture company in Canada that wanted to sell compact fluorescent light bulbs (CFLs) because of their high energy efficiency. IKEA was however, concerned about the mercury content of such bulbs. So it set a low maximum mercury content which the manufactures had to now adopt in their productions of bulbs. This made the production of the specified bulb (with maximum low mercury content) even cheaper in the long run and more competitive because of the high turn-over. See also another example is found in a report by the Economist of September 4th 2008 entitled: "*Greener, not leaner: Faced with big penalties, carmakers are improving efficiency."* It read as follows:

> "The EC plans to impose penalties on companies by 2012 if their fleets emit over 130 grams of carbon dioxide per km (g/km). After much complaining about the technical impossibility of compliance (especially from German makers of big luxury cars), companies have got on with rolling out new technologies to improve efficiency. BMW cut its average fleet emissions by 7.3% last year by using "efficient dynamics" across its range, according to T&E, a transport think-tank." [available at: http://www.economist.com/daily/news/displaystory.cfm?story_id=12067887&fsrc=nwl (accessed 07/08/08)]

direction of climate-friendly goods and services. In this wise, the *EU Environmental Technologies Action Plan*[583] also sees green public procurements part of a broader strategy to motivate innovation.[584]

5.3. 2 GPP as a "leading by example" tool

With GPP, which is a market-based, rather than traditional command and control (legislation) approach, Kyoto Parties are also aiming to lead by example in the action against global warming. They seek to also improve their public image and increase their legitimacy as contributing to global sustainability.[585] As governments acts as both a regulator and participant in the procurement market, their actions, including greening of the process, naturally will be looked upon by other players in the market.[586] This will incentivise the private sector and individual citizens to also make their contribution.[587]

Private sector and individual citizens' contribution may manifest in the form of supporting other climate change related policies. They will for instance embrace in good faith carbon, green congestion or "gas guzzler" taxes. Similarly citizens will

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[583] (COM (2004) 38 (final).

[584] See *Guide On Dealing With Innovative Solutions In Public Procurement*: *10 elements of good practice* (Commission Staff Working Document), SEC (2007) 280, p. 3 (available at: http://www.proinno-europe.eu/doc/procurement_manuscript.pdf)

[585] See Clement, S., et al, The Procura+ (Manual: A Guide to Cost-Effective Sustainable Public Procurement) (2nd edition) (ICLEI European Secretariat, 2007) at p. 9.

[586] See also McCrudden, *supra,* n. 523 at pp. 378-379 (discussing the significance of using public procurement as a tool for governments to use in showing leadership and to encourage the observance, by private business, of corporate social responsibility (CSR) in their purchases and operations. He cited the UK government practice as an example. See p. 387).

[587] An example is the requirement by UK government under the *Display Energy Certificates (DECs)* scheme for building to display the extent of energy of buildings, which comes into effect from 1 October 2008. In order to support the new measures prior to the implementation start-up time of October 2008, public authorities are already producing DECs ahead of October and a range of buildings now have the certificates including Eland House and the Natural History Museum. See Display Energy Certificates (DEC) and Advisory Reports (AR): Transitional arrangements for buildings on a site or campus, (Department for Communities and Local Government, London UK, August 2008), available at: http://www.communities.gov.uk/documents/planningandbuilding/pdf/919529.pdf (accessed 31/08/08). See also *Energy Performance Certificates (EPC)* which is part of a series of measures being introduced across Europe to reflect legislation which will help cut buildings' carbon emissions and tackle climate change. (http://campaigns.direct.gov.uk/epc/)

tend to show more understanding if, for instance, green procurement policy results in higher electricity bills on them. Higher costs borne by them will in due course be translated into "asset" as this makes them change their behaviours and attitude to energy usage: making them conserve more energy, and use it more efficiently. Green procurement thus potentially instils in the private sector and private citizens the sense of discipline so that they use their energy more efficiently. Indeed it will encourage private business, as McCrudden[588] has shown, to also initiate other voluntary activities and measures to serve as part of their CSR.

5.4 Global and national initiatives on green/sustainable procurement

In recognition of the value added by GPP to the efforts targeted at climate change and sustainable economic development, several initiatives and programmes have started at global, regional and national levels to promote it. The following paragraphs highlight such initiatives.

5.4.1 The United Nations

At global level, the UN guidelines for consumer protection call on governments and international agencies to ensure sustainable practices in their operations, particularly through their procurement policies. The guidelines cited government procurement as an "appropriate" avenue through which to encourage the "development and use of environmentally sound products and services."[589] The guidelines also warned that GP policies should "not become barriers to international

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[588] See Mccrudden, *supra,* n. 523, pp. 378-379

[589] In its quest to provide appropriate leadership and guidance, UNEP in 2008, engaged the ICLEI's Sustainable Procurement team to develop guidance for sustainable procurement of IT office equipment for 6 of UNEP's regional offices for Europe, Latin America, North America, East Africa, Middle East and Asia-Pacific. See *the United Nations Guidelines for Consumer Protection* (as expanded in 1999) (para. 54) http://www.un.org/esa/sustdev/publications/consumption_en.pdf . In applying any procedures or regulations for consumer protection, For the WB activities on green sustainable procurement, see Centre for International Environmental Law (CIEL), *Eco-Labelling Standards, Green Procurement and the WTO: Significance for World Bank Borrowers* citing the WB Press Release: *Putting Social and 'Green' Responsibility on the Corporate Agenda* (July 21, 2001) (2001/394/S) at n. 1 p. iv (available at http://www.ciel.org/Publications/Ecolabeling_WTO_Mar05.pdf) (accessed 27/07/08).

trade and that they are consistent with international trade obligations."[590] The UNEP is one of the UN designated agencies coordinating the development of environmental policies.[591] UNEP supports green and sustainable procurement initiatives especially under Marrakesh Task Forces, a framework for promoting sustainable consumption and production.[592] UNEP generally promotes exchange of information regarding stakeholder experiences gained in sustainable procurement initiatives and activities around the globe.[593]

5.4.2 The World Bank

The WB's Environment Department collaborates with other departments including the *Operational and Country Procurement Services Group,* to promote what the WB calls *environmentally and socially responsible procurement* (ESRP). The ESRP program works to *green* the specifications for the Bank's corporate and operational procurement. It also strengthens the requirements for procurement related to Bank-funded projects. The objective is "to better reflect global environmental concerns such as biodiversity, climate change, the ozone layer, and persistent organic pollutants."[594] So far, the WB's focus in this regard, is mainly to educate and create more awareness and train staff and schedule officers on how to develop bidding documents and the drafting clauses for technical specifications which incorporate

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[590] *Ibid.*, paras. 10 and 69.

[591] See ICLEI's newsletter, "European Circular", Issue No. 31 Spring, 2008, p. 9.

[592] It was one of the initiatives called for by the WSSD Plan of Implementation. It instituted a 10-Year Framework of Programmes on Sustainable Consumption and Production (SCP). See *UNEP 2007 Annual Report,* available at: http://www.unep.org/PDF/AnnualReport/2007/AnnualReport2007_en_web.pdf (last accessed 03/08/08), especially at pp. 72-79. For more on the task force and the regional and national policy responses and activities see UN Commission on Sustainable Development (CSD), *"Overview of progress towards sustainable development: a review of the implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the Johannesburg Plan of Implementation Report of the Secretary-General,"* (CSD Fourteenth session 1-12 May 2006), p. 24.

[593] See UNEP at www.uneptie.org/pc/sustain/ See also Polak, J., *The Climate Change Difference,* Government Procurement / October 2003, p.13.

[594] See The World Bank's Operational and Corporate Commitments at http://siteresources.worldbank.org/ESSDNETWORK/Resources/481106-1129303936381/1777397-1129303967165/Chapter6.html (last visited 03/08/08).

environmental concerns.[595] In 1998, the WB collaborated too with the World Wildlife Fund for Nature (WWF) to institute green procurement in forestry.

5.4.3 The OECD

The OECD also has made immense progress in the area of GPP. Greener purchasing initiatives in the OECD member countries dates back to 1996[596] when the *Recommendation of the Council on Improving the Environmental Performance of Government,* 1996,[597] was adopted. This recommendation served as formal declaration of "support for the use of environmentally-preferable public procurement practices" of the member countries. The recommendation called upon member countries "to take concrete steps to ensure the incorporation of environmental criteria into public procurement of products and services," and suggested the steps to be employed to achieve that end. Just like the WB's, this recommendation also warned that GPP measures should not create unnecessary obstacle to, or be a disguised discrimination contrary to, international trade regulations.[598] The OECD organised workshops and produced publications which most focussed on "policy reviews of GPP programmes and initiatives as practiced in OECD member countries, as well as examined the institutional factors which facilitate or hinder their success."[599]

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[595] *Ibid.*

[596] See OECD, *The Environmental Performance of Public Procurement: Issues of Policy Coherence,* (OECD, 2003), p. 5.

[597] OECD Council Recommendation: C(96)39/FINAL dated 21-Mar-1996. This recommendation which was also reiterated in the OECD *Recommendation of the Council on Improving the Environmental Performance of Public Procurement* of 23 January 2002 [OECD document no. C(2002)3 available at: www.webdomino1.oecd.org/horitontal/oecdacts.nsf/linktoC(2002)3].

[598] See OECD *Environmental Strategy for the First Decade of the 21st Century,* part of the environment vision adopted by OECD Environment Ministers in May 2001. See *Ibid.*, p. 15.

[599]See OECD, *Greener Public Purchasing: Issues and Practical Solutions, supra* n. 219; See also *Trade Issues in the Greening of Public Purchasing* [COM/TD/ENV(97)111/FINAL] (available also at http://www.oecd.org/ech/docs/envi.htm). See also a note *on Sustainable Public Procurement: Issues Facing the Marrakech Process Task Force on Sustainable Public Procurement,* prepared for the 1st SPP Task Force Meeting, Jongny sur Vevey (Switzerland), 2006, http://eea.eionet.europa.eu/Public/irc/envirowindows/scp_procurement/library?l=/background_papers/background_paperdoc/_EN_1.0_&a=d (accessed: 21/04/08)

5.4.4 The European Union

The EU has relatively a more mature GPP system. It will be seen in chapter 6[600] how GPP in the EU has become an integral part of its portfolio approach to environmental and energy policies of the EU. So far, green criteria have started appearing significantly in tenders of seven of the 27 EU Member States. These include Austria, Denmark, Finland, Germany, the Netherlands, Sweden, Switzerland and the UK representing more than 40 per cent of tenders published in the year 2007.[601]

5.4.5 GPP and developing countries

The performance of developing countries in the area of green procurement and the challenges they face is considered a subject of another and more extensive study. However, as developing countries are partners in the global fight against environmental degradation, it pertinent to include a few remarks as are relevant to the points being made in the discourse. The participation of developing countries in climate change mitigation efforts however has been controversial as the UNFCCC and Kyoto Protocol do not impose on them legal obligations to reduce their emissions. This is in view of the fact that they did not contribute, historically, to the current deplorable state of the global climate. Secondly, developing countries have low capacity to address environmental challenges which mostly require capital-intensive programmes and projects.[602] They lack the technology to produce and

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[600] See *infra,* Chapter 6 Section 6.6

[601] See *The power of green public procurement in the EU*, at Climate Action, at: http://www.climateactionprogramme.org/features/Art./the_power_of_green_public_procurement_in_the_eu/ 9last accesses 13/02/09).

[602] See The Economist [Sep 12th 2008 (online edition)], *Climate change and the poor: Adapt or die -Poor countries are hit hardest by global warming.* The story indicated, as the IPCC and the Stern Review on the Economics of Climate Change reports had warned, the *"poorest, a billion people in 100 countries",* would be affected most adversely by climate change. Coping with climate change, according to a UNDP and other authoritative sources, would cost the developing world "*tens of billions of dollars"* annually. With the current aid standing at a meagre $300m, developing countries will then have to do it all themselves, thus paying for *"the sins of their neighbours"* available at

market climate-friendly products and services that meet up the standards required at international procurement markets. GPP will therefore mean opening up of markets for green goods and services produced by developed countries into developing countries.

The above are the real issues being raised, including at conferences.[603] Friends of the Earth (FoE), an international environmental NGO, has voiced such concerns citing, for example Malaysia's complaints against Japan's green purchasing law and policy as constituting a non-tariff barrier against Malaysa's exports thus:[604]

> "The law on Promoting Green Purchasing, implemented on 1 April 2001, has designated several products of export interest to Malaysia, the procurement of which will need to comply with the law. The law enforces stringent 'evaluation criteria', such as recycling and reuse, and minimal impact on the environment upon disposal. [There is also an] unrealistic target for suppliers to meet 100 per cent of the evaluation criteria by end of 2001. Adaption takes time and this is causing disadvantage to Malaysian exports."[605]

Already, the WTO GPA requires more transparency and the opening up of domestic procurement markets to international competition. Thus, in the absence of any special provision or arrangement to address this capacity building issue, developing countries may be alienated further from the GPA, and consequently further disabled to participate in procurement market for green goods and services. This is an area where further research would be required. It ought to be mentioned however that

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http://www.economist.com/research/Arts.BySubject/displayStory.cfm?story_id=12202374&subjectID=348924&fsrc=nwl (accessed: 19/09/08).

[603] See *Commission's green procurement plans heavily criticized*, published Monday 16 August 2004 and Updated: Thursday 9 November 2006, at Euractiv *Forum Europe Conference* report 2004: http://www.euractiv.com/en/environment/commission-green-procurement-plans-heavily-criticised/Art.-114854 (last accessed 12/08/08).

[604] WTO document: TN/MA/W/25/Add.2

[605] See *Selected notifications of non-tariff barriers in the Non-Agricultural Market Access,* WTO talks - compiled by Friends of the Earth International April, 2005 (TN/MA/W/25/Add.2), available at http://www.foe.co.uk/resource/evidence/non_tariff_barriers.pdf (accessed 05/11/08).

despite these constraints on the developing countries, Taiwan (Republic of China)[606] has the credit of being the first country in the world (developed countries inclusive) to legislate for green procurement.[607]

On the wider issue of the interaction between environmental policies and trade, the WTO jurisprudence has started to look in-wards seeking to give special consideration to the above stated constraints of the developing countries. For instance, the AB in the recent *Brazil – Tyres* ruling, in applying the *necessity* test under GATT Art. XX(b), considered the reality of the conditions in Brazil, a developing country, and rejected the alternative measures suggested by the EC as less trade-restricting than the measure instituted by Brazil (total import ban). [608]

5.5 Summary

This chapter, broadly, discussed the evolution of the concept of GPP and its processes. The primary aim of procurement is to deliver value for the tax-payers' money. The protection of the environment is thus an added value of the GPP. The chapter saw the connection between GPP policy objectives and practices, on the one hand, and climate change mitigation strategies, on the other. GPP was promoted as a component of sustainable procurement, by multilateral agencies and regional economic integration organisations. GPP also features in the environment and energy polices of the member countries to these institutions. This was all in pursuance of the principle of sustainable development as developed from the UNCHE, UNCED and the WSSD.

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[606] Taiwan (Republic of China) should not to be confused with the People's Republic of China (popularly known as "China") which is not the reference point here. See Taiwan's Government Information office website at: http://www.gio.gov.tw/ct.asp?xItem=18690&CtNode=2579&mp=807 (last visited 07/06/10)

[607] The *Government Procurement Law of 1998 of the Republic of China*, under Art. 96, states that government agencies may give preference to the purchase of environmental-friendly (green) products. See Lai, M. S. and Yu, N., *"The Current Status of Green Procurement in Taiwan, ROC,"* Special Reports (Environment and Development Foundation, Hsinchu, Taiwan, ROC) (undated but estimated 2002) available at: http://proj.moeaidb.gov.tw/isdn/sidn/3-2/special.htm (last visited 12/08/08).

[608] *Ibid.* paras. 171-175. See *infra,* Chapter 7, Section 7.3.1.5(c).

The chapter also discussed the trade connection of the GPP. Green or climate-friendly products and services are by nature based on non-product related PPMs. This brought into play the question whether GPP in fact constitutes non-tariff barrier or in any way discriminatory contrary to the trade rules. This question becomes even more prominent because GPP permits the use of international standards and eco-labelling in designing technical specifications for the products and services to be procured. This aspect is considered in detail in the following chapter.

PART III

THE SCOPE AND POLICY SPACE FOR GPP UNDER THE GPA: *EXAMINING THE PPMS DEBATE AND THE EXPERIENCE UNDER THE EU SYSTEM*

CHAPTER 6

THE SCOPE FOR GPP UNDER THE GPA AND EU LAW: PRODUCT/SERVICES SPECIFICATIONS AND THE "PPMs" QUESTION

6.1 Introduction

This chapter addresses the likely legal issues that arise when environmental considerations are incorporated into procurement processes. It specifically looks at GPA regulations concerning product specifications and supplier conditions for participation vis-à-vis climate-friendly procurement practices. To serve as an illustration of the issues being discussed, the chapter will have a brief[609] look at GPP practice under the EU procurement system. It was indicated in chapter 2, the fears expressed by commentators in the academia, on the potential for GPP to be problematic under the WTO rules. They opined, for instance, that differential treatment prohibited by WTO rules "could occur in [inter alia] … the [technical] specifications in tenders and in specifying condition(s) for participating in government procurement bids"[610] Thus, the chapter looks more closely at GPP practice, including how product/services technical specifications are designed.

The requirement in tender notices for environmental and energy efficiency standards of product/services usually give rise to PPMs questions.[611] One fear is the use of non-product related PPMs to covertly protect domestic industry or suppliers. To address this concern, the GPA requires that such specifications should be based on international standards where available and appropriate, or national technical regulations. Also eco-labels could be used to identify or describe the products and

[609] The examination of the GPP under the EU and GPA is brief here for space-saving. This is because the author has published a paper on the subject. See Malumfashi, G. I., *supra,* n. 11.

[610] See for instance, Zhang and Assunção, *supra,* n. 149.

[611] See supra chapter 2, section 2.2.3.

services needed. The question is to what extent is this requirement a solution to the problem of protectionism based on non-product related PPMs?

Another area of concern relates to the extent of the procurement entities' freedom to set the conditions for the suppliers' participation in the process. That is to say can they require tenderers to show technical environmental management certification or qualification? The GPA provides that only those conditions relevant to the supplier's ability to perform the contract in question should be included. This is to guard against unjustifiably disqualifying an otherwise qualified potential bidder.

The chapter in section 2 identifies the main GPA provisions regulating generally the use of technical specifications in GP tendering processes. Section 3 introduces the basic features of the EU GPP system as compared with the GPA's approach. Section 4 discusses the GPP in the context of the debate on PPMs. Section 5 discusses how GPP processes could result in de-facto discrimination contrary to the GPA non-discrimination norms under Art. III. Section 6 will conclude the discourse.

6.2 Regulation of technical specifications in tendering under the GPA

6.2.1 Technical specifications stage and its significance in GPP process

The technical specifications stage is a key feature of GP processes.[612] This stage signifies the part of the tender notice where the goods or services are described in detail so that prospective tenderers or suppliers are clearly and adequately informed of what the procuring entity requires in the particular procurement exercise. The stage affords the opportunity for procuring entity to include climate-friendly attributes of the goods and services required. The provisions of Art. VI of the GPA regulate the use of technical specifications, in relation to goods, services and their

[612] See OECD, *Trade Issues in the Greening of Public Purchasing,* OECD/TD/ENVIRONMENT(97)/111/FINAL, (Paris, 1999) p. 12, available at: http://www.oecd.org/dataoecd/17/7/39919037.pdf (last visited 15/03/08).

processes. These provisions guide procuring entities to observe the disciplines of non-discrimination as well as transparency in their GP procedures.

Art. VI of the GPA on technical specifications states, in part:

> 1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the *processes and methods for their production* and requirements relating to conformity assessment procedures prescribed by procuring entities, *shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade*.
>
> 2. Technical specifications prescribed by procuring entities shall, *where appropriate:*
>
> (a) be *in terms of performance rather than design or descriptive characteristics*; and
>
> (b) be based on *international standards*, where such exist; otherwise, on *national technical regulations, recognized national standards*. or building codes.[613] (Emphasis added) [614]

Thus, technical specifications should define the general and specific characteristics of a product or service, including levels of quality, performance, safety and dimensions as well as marking and labelling and other features, so as to distinguish it from other products and services in the same category.[615] The function of technical specifications therefore is to generally stipulate measurable requirements for the evaluation of tenders, thereby providing the prospective tenderers with the

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[613] This provision has 2 footnotes (Nos. 3 and 4) which provided definitions for national "technical regulations" and "national standards" respectively. See below: Sections 3.2 (b) and (c).

[614] There is as yet no WTO judicial interpretation or jurisprudence on the above provisions of the GPA. However, "technical regulations" are essentially a subject of two other WTO agreements: the *Agreement on Technical Barriers to Trade* (TBT Agreement) and the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement) (See WTO Agreement Series, Vol. 4 available at www.wto.org). "Technical specifications" are defined in these agreements in similar terms as the GPA Art. VI above, with minor variations.

[615] See also the UK government procurement guidelines at BERR (Department for Business, Enterprise and Regulatory Reform), *Procurement manual Section H: guide to the European Union services directive & WTO government procurement agreement (GPA)* available at BERR website: http://www.berr.gov.uk/aboutus/procurement/buyers-guides/page22752.html (last visited: 21/10/08).

minimum compliance criteria for the particular procurement.[616] Specifically, technical specifications should set "the minimum quality standard acceptable for the performance of the contract in question."[617] Technical specifications may thus include the environmental characteristics, processes and production methods, or specific environmental effects of product or services.[618]

By informing the tenderers what is required of them, technical specifications stage is thus targeted at safe-guarding equal treatment towards all suppliers pursuant to the non-discrimination requirements of Art. III of the GPA. In this regard, also, Art. VII:2 requires entities to provide suppliers with information in a manner that will "not preclude competition, nor have that effect." This stage thus serves to ensure transparency in GP.[619]

Technical specifications in GPP therefore are about setting consideration of environmental externalities (additional effects on the environment of the purchase and use of products or services) which were not paid for by the manufacturer or consumer. These externalities could relate to the product itself at the level of consumption, or the PPMs at the level of production.[620] The PPMs are relevant and strategic in GPP in two senses or levels:

a) they could indicate how much energy was used and/or saved in producing a particular product or performance of a particular service, for instance, in

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[616] See EC, Buying Green, *Supra,* n. 168, p. 17.

[617] See *UK Government Timber Procurement Policy: Timber Procurement Advice Note*, November 2005 available from the CPET website: www.proforest.net/cpet

[618] See also *Directive 2004/18/EC, supra, n. 361*, particularly *Section 9* thereof, for discussions on environmental specifications of the product in procurement process.

[619] In particular Art. VII:1 requires each Party to the GPA to ensure that its tendering procedures are applied in a non-discriminatory manner, referring also to Arts. VII – XVI on tendering processes. See *supra,* Chapter 3, Section 3.4.1.

[620] See, WTO, *World Trade Report 2005: Exploring the links between trade, standards and the WTO,* (WTO Secretariat, Geneva, 2008) at p. 49.

producing energy efficient computers, or generating electricity. It may also be included here, a consideration of the "type" of energy used in the process, namely whether it was produced from a renewable source or that produced from conventional fossil-based sources.

b) they indicate how the product performs or how the service is being rendered, in terms of energy efficiency, and general environment-friendliness.

The above scenario in (b) is distinguished from (a) in that while (a) relates to the production processes and methods of a particular product or services, (b) relates to the working or performance of the product or service specifically in terms of energy efficiency and general environment-friendliness. That will mean, in the case of a climate-friendly "product," for instance, a more energy-efficient computer (in terms of its PPMs) would be preferable to one that is less energy efficient even if the two computers are not only physically the same, and perform efficiently the normal purpose for which computers are required. But an energy-efficient computer (in terms of its lower energy consumption in terms of performance) would be even more preferable. Compliance with such requirement is usually indicated by the packaging system or the labelling printed on the products.[621] And this makes the issue of eco-labelling relevant.

In the case of a climate-friendly "service" procurement, procuring entity (for instance, local public transport service), would specify that the required public transport service should be provided by a company whose: (i) bus fleet themselves were manufactured through energy efficient methods, and that (ii) bus fleets use certain minimum percentage of the fuel (electricity) generated from renewable energy or biofuels. It will make matters more complex in this regard if the fuel-related requirement adds that the renewable fuel (e.g. biofuels) should itself be

[621] Where such packaging or labelling proliferates, then this may bring about problems of their authenticity, which then calls for the need coordination and certification by recognised body or institution.

shown to have been produced or generated through the use of sustainably managed biomass.[622] Further, that the supplier of the service must show an EMS certification. Thus, in GPP, the technical specifications could refer to the products or services to be procured, but could also indicate the intrinsic values of the products and services which may or may not be physically discernible or even relevant in terms of the performance of the final product, or the delivery of the service. These are the types of requirements generally feared to potentially constitute a non-tariff barrier[623] in international trade which the DDA is inter alia set to eliminate.[624]

6.2.2 Conditions governing technical specifications

Where a procuring entity inserts climate-friendly considerations in tender notices, it should bear in mind the GPA requirements in that regard thus:

1. technical specifications should where "appropriate," be based on *international standards*, where such exist; otherwise, on *national technical regulations, recognized national standards* or building codes.[625]
2. eco-labelling could be used as evidence of compliance with a specified standard for the product or services.[626]
3. technical specifications should relate to the *performance* rather than characteristics or descriptive design of the products.[627]

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[622] See New Zealand Procurement Policy, Ministry of Economic Development, Manatu Ohanga, Government *Procurement Standards and Targets,* available at: http://www.med.govt.nz/templates/ContentTopicSummary____29449.aspx (last visited 08/10/08).

[623] According to the WTO, there is no official definition of a non-tariff barrier but, in general terms, it refers to "any measure other than a tariff which protects domestic industry." Agreements such as the SPS and TBT aim at allowing governments to take due care of these legitimate goals while minimizing the impact on trade and avoiding the temptation to use them as disguised protectionism. See http://www.wto.org/English/tratop_e/markacc_e/nama_negotiations_e.htm (accessed 27/06/08).

[624] See *supra,* Chapter 5, Section 5.2.

[625] GPA Art. VI (2),

[626] *Ibid.,* Art. VI:2(b)

[627] *Ibid.,* Art. VI:2(a)

The above rules are also to be considered against the *chapeau* to Art. VI, namely, technical specifications should not be "prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade." These conditions are discussed below in the light of GPP policies and practice.

6.2.2.1 International standards

Unlike the TBT and SPS Agreements, the GPA has not specifically defined an *international standard* to form the basis for technical specifications.[628] Standards are usually set by recognised international bodies. They incorporate the views and expertise of a very wide range of interests from consumers, academia, special interest groups, government, business and industry.[629] Thus, an international standard for the purpose of the GPA Art. VI:2 may mean that which is developed multilaterally and with the involvement of all relevant stakeholders.[630] Footnote 4 to GPA Art. VI(2) above, requires that a standard should be "a document approved by a recognized body". As no "recognised body" has been defined by the GPA, this may mean a body recognised at an intergovernmental level, or with membership composed of a combination of governments, private sector and non-governmental organisations.[631] The International Standardisation Organisation (ISO)[632] can be an

[628] Indeed it is only the SPS Agreement that has defined comprehensively what international standards are to be covered by the Agreement. Annex A paragraph 3 on *International standards, guidelines and recommendations*. The TBT agreement, on the other hand, merely says that "standards prepared by the international standardization community are based on consensus."

[629] Standards thus represent a consensus on current best practice. http://www.bsi-global.com/en/Standards-and-Publications/About-standards/Differences-between-Consensus-and-Commissioned-standards/

[630] A "standard," however, has been defined by the *Concise Oxford Dictionary* is "a level of quality or attainment…. Something used as a measure, norm, or model in comparative evaluations". See 10th Revised Edition edited by Judy Pearsall, 2001, p. 1399.

[631] Indeed, GATS Art. VI.5(b) under footnote 3, has defined "Relevant international organizations" for the purpose of GATS Art. VI.5(a),_as those open to all WTO Members.

[632] ISO is one of the world's foremost developers of voluntary technical standards, and seeks to establish a "bridge between the public and private sectors" on formulation and certifications of industry standard. See ISO website at http://www.iso.org/iso/about.htm (accessed last 10/08/08).

example of such an international body is the Indeed, ISO is the "the world's largest developer of standards" according to the World Trade Report 2005.[633]

6.2.2.2 Appropriateness of International Standards

The GPA requirement of technical specifications to be based on international standard applies only where such a standard is "appropriate". This term "*appropriate"* however has not been defined by the GPA. This omission has already been seen as a "potential loophole in the GPA."[634] Literally, *appropriate* could mean "suitable".[635] Thus it is suitable for the purpose intended, an international standards that exists alongside national technical regulations, national standards or building codes, should used as basis for technical specifications. This interpretation could be justified by the term "otherwise" in the same paragraph (b).[636] The effect of this is to give international standards a superior position or preferential treatment among the alternative sources listed in that paragraph. However, it is still not clear what the legal effect will be if technical specifications are not based on international standards, but on one or more of the other sources in the list. In other words, there is no specific sanction for non-compliance, or reward for compliance. That may inform the view held by some commentators including van Calster that use of international standards as basis of technical specifications under the GPA is merely optional.[637]

The provisions of GPA on the use of international standards could be contrasted with those of the TBT and SPS agreements dealing also with the subject of standards. The approach used both in the TBT and SPS agreements is that of

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[633] See generally, WTO, *World Trade Report 2005, supra,* n. 621.

[634] See Hoekman, B. M., and Mavroidis, P. C., *supra,* n. 264, p. 7.

[635] See *Concise Oxford Dictionary* (10th Edition), *supra,* n. 687.

[636] GPA Art. VI:2(b)

[637] See Van Calster, G., *surpa* n. 38, p. 302.

explicitness. The TBT Agreement *requires*[638] national technical regulations to be based on international standards, where they exist and are not inappropriate or ineffective.[639] Indeed, the TBT Agreement explicitly provides that basing national technical regulations on relevant and appropriate international standards leads to presumption, though rebuttable, that the regulations are not more trade restrictive than necessary to fulfil the legitimate objectives aimed at.[640] Thus, it seems safe to suggest that the meaning of "appropriateness" here is with reference to the actual relevance of the content of the standards and not just its hierarchy, namely, its being "international" and not national.

Similarly, under Art. 3 of the SPS Agreement, Members should mandatorily base their sanitary or phytosanitary measures, for the protection of risk to human, animal or plant life or health, on international standards where they exist.[641] Thus, international standard is the bench-mark for the required level protection of risk to human, animal or plant life or health. Indeed, the SPS Agreement went a step further and allowed Members to adopt a sanitary or phytosanitary measure which provides a higher level of protection than what relevant international standards

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[638] The term used in TBT Art. 2 is: "shall use" denoting a duty. See Bernstein, S. and Hannah, E., *Non-state global standard setting and the WTO: legitimacy and the need for Regulatory Space,* JIEL (Advanced access published July 19, 2008), pp. 1-34, at p. 12.

[639] TBT Agreement Art. 2.4. Note however that TBT generally doesn't apply to transactions generally covered by the GPA. TBT Art. 1.4 provides that *Purchasing specifications prepared by governmental bodies for production or consumption requirements of governmental bodies are not subject to the provisions of this Agreement but are addressed in the Agreement on Government Procurement, according to its coverage.*

[640] TBT Art. 2.5. The legitimate objectives for which technical regulations may be maintained are stated in Art. 2.4. They include, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

[641] The relevant international standards for the purpose of SPS Agreement are those developed by *FAO/WHO Codex Alimentarius Commission* and the *International Animal Health Organization (Office International des Epizooties)* for food available and animal health respectively. These are available at: http://www.codexalimentarius.net/web/index_en.jsp and (accessed 18 October, 2008). And international standards for plant health are those issued by the *FAO's Secretariat of the International Plant Protection Convention,* available at: https://www.ippc.int/IPP/En/default.jsp (accessed 18 October 2008).

provide, provided that there should be scientific justification for this.[642] The AB in *EC - Hormones*[643] ruling confirmed this position. In other words, SPS Members may maintain whichever of the two standards (international or national) that results in a higher level of sanitary or phytosanitary protection. Subjecting the use of stricter SPS standard than the level required by international standards to scientific risk assessment has been described by Melaku Desta as a "delicate compromise" between the need for industrialised countries of the WTO to maintain high standards and the developing countries members to safe-guard their market access in agricultural commodities.[644]

6.2.2.3 International environmental standards as specifications in GPP

For the purpose of GPP, international standards to be used could include those international environmental standards developed by international standardisation bodies concerned with environmental protection and management. The ISO has developed a series of such standards.[645] These standards assist entities in preparing step-by-step implementation plans to adopt an adequate and effective

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[642] SPS Agreement Art. 3.3. See also WTO brief: *Understanding the WTO: The Agreements,* at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm (accessed 18/10/08).

[643] *EC – Hormones* (ABR), *supra,* n. 31, para. 127. See also *infra,* Chapter 7, Section 7.3.2

[644] See Desta, M. G, *EU Sanitary Standards and Sub-Saharan African Agricultural Exports: A Case Study of the Livestock Sector in East Africa,* [The Law and Development Review *manuscript 1002) 2008],* p. 21.

[645] The ISO series include the ISO 14000 and 14001 for environmental management systems (EMS). ISO 14001 is an internationally accepted standard which sets out how to establish effective environmental management systems (EMS) by firms. ISO 14000 environmental standards are divided into six categories: (1) environmental management systems; (2) environmental auditing; (3) environmental performance evaluation; (4) environmental labelling; (5) life-cycle assessment; and (6) environmental aspects in product standards. See Egger, M., *"Are ISO standards a suitable instrument for supporting a sustainable banana economy?"* available at:

<www.bananalink.org.uk/documents/ISO_as_suitable_instrument_for_sustainability_by_M_Egger.doc>. Indeed ISO 14001 is reputed as the "second most global standard". Its recognition and use spread to "over 90,000 organisations in 127 countries". The standard is designed for organisations to balance profitability and reducing environmental impact and working to achieve both objectives. see BSI British Standards at http://www.bsi-global.com/en/Standards-and-Publications/About-BSI-British-Standards/ (accessed last 15/11/08)

environmental management system, conduct proper environmental audits, and successfully become registered to ISO 14001.[646]

There are however thorny associated legal and ethical issues as the above arrangements relate to international trade. These issues also surround the questions of appropriateness of international standards. These include:

1) For international environmental standards to be appropriate for the purpose of technical specifications, they, *inter alia* "need to reflect the particular environmental and developmental context to which they apply,"[647] and that they do not unnecessarily constitute a non-tariff barrier to cross-border trade, or cause additional economic and social cost to others, particularly developing countries.[648]

2) Generally, under both the TBT and SPS agreements, international standards would be inappropriate if they are not based on sound science and risk assessment.[649] However, international environmental standards could also be based on the precautionary principle, one of the central premises upon which the climate legal regime is based.[650]

Thus, where an international standard constitutes a barrier to trade, the purpose for which a particular standard is maintained then becomes contentious. The GPA in this regard seems to accommodate the approaches found both under the TBT and SPS agreements mentioned earlier.[651] However, GPA is less strict on the

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[646] See Rezaee, Z., *Emerging ISO 14000 environmental standards: a step-by-step implementation guide,* Managerial Auditing Journal, Volume 15 Number 1/2 2000 pp. 60-67.

[647] See Principle 11 of the 1992 Rio Declaration at UNCED, *supra,* n. 60

[648] See WTO, *Environmental requirements and market access: preventing 'green protectionism'* at http://www.wto.org/english/tratop_e/envir_e/envir_req_e.htm (last visited 10/03/08)

[649] TBT Agreement Art. 2.5; SPS Agreement Art. 5.

[650] See *supra,* Chapter 4, Section 4.4.3.2.

[651] That is to say the effect under TBT and SPS of adopting international standard is the presumption of compliance and non-trade restrictiveness.

admissibility of technical specifications not based on international standards. In other words, since technical specifications can be based also on other premises or sources than international standards (includind national technical regulations, national standards, and building codes), it gives GPA parties the flexibility and more policy space upon which to base their climate-friendly technical specifications.

Whether based on international standards or on other sources, so long as the suppliers are required to fulfil those specifications then compliance has become mandatory. Hence one may conclude that the wider latitude given by the GPA as compared with the TBT and SPS affords more policy space for GPA Parties to legislate in the area of technical specifications. This the wider legal space however could translate to a disadvantage on the suppliers, as the wider discretion in the hands of procuring authorities allows them to include all sorts of technical (e.g., climate-friendly) specifications. These may constitute more barriers against the suppliers.[652]

6.2.2.4 National technical regulations, standards and building codes

As an alternative to international standards, GPA Art. VI:2(b) allows technical specifications to be based on national technical regulations (NTRs). Thus procuring entities could demand from suppliers such products or services the technical descriptions of which are contained in certain national technical regulations in force in the country.[653] Thus, in substance, technical regulation is similar to a standard.

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[652] For an insight on the positioning, by TBT disciplines (under Art. 2.4) of international standards which are essentially voluntarily created, into a source of international obligations, see generally, Howse, R., *'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "International Standards"',* in Jeorges, C. and Petersmann, E. (eds.), Constitutionalism, Multilevel Trade Governance and Social Regulation, (Portland: Hart, 2006) 383–96.

[653] Footnote 3 of this Art. defined "technical regulation" as "a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which *compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method."

The main difference is that technical regulation is a State legislation.[654] Therefore, while compliance with international standard is not mandatory, it is, in the case of NTRs. This means producers of products, or suppliers of services are not generally bound to comply with international standards, but would be bound to observe them if they are incorporated in relevant NTRs. Where the product description in the NTRs incorporates climate-friendly specifications, then tender notices could refer to them.

Technical specifications included in tender notices could also be based on "recognised national standards" and "building codes".[655] National standards could be corollary to national technical regulations, in the sense of the two being a national instrument, subject of course to the fact that a standard is not generally a binding document until it is codified into national regulations. It is not certain, for lack of jurisprudence on this section of the GPA, what constitutes a "recognised" standard at national level of the GPA Parties. A national standard may earn the "recognised" status, for the purpose of the GPA, if derived from international standards, or formulated through the involvement of various relevant stakeholders. This is analogous to national technical regulation which under the TBT and SPS commands more acceptability internationally if based on international standard.

Building codes too are technical guidelines developed by design and construction industry to provide "safe, decent, affordable, and environmentally safe buildings."[656]

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[654] NTRs related to GPP are usually issued by State environmental protection agencies or ministries responsible for environmental protection affairs. They usually also mandate the use of specified eco-labelling schemes as a basis for product specifications. In the US, for instance, there is U.S. Environmental Protection Agency (USEPA) and the U.S. Department of Energy, which mandated the use of Energy Star eco-labelling programme. See generally, Commission for Environmental Cooperation of North America (CEC), *"Green Procurement: Good Environmental Stories for North Americans"* (Prepared by Five Winds International, March 2003). This document is available at http://www.cec.org/files/pdf/ECONOMY/2003-GreenProcurementReview_en.pdf (accessed on 10/08/08)..

[655] GPA Art. VI:2(b)

656 This definition is by the US National Conference of States for Building Codes and Standards (NCSBCS). See NCSBCB is a not-for-profit organization formed in Wisconsin in 1967. It was in response

These codes serve as model for the adoption of the countries that participate in their formulation, and for the regulation of building and construction industry. By an analogy to an internationally based TBT regulation, such codes as multilaterally formulated could be presumed, rebuttably though, to be less trade restrictive, since is if it is based on international standards.

6.2.2.5 Eco labelling

Technical specifications may also cite a particular eco-labelling (also called "ecological labelling" or "environmental labelling") scheme as evidence of compliance with the quality and standard required of the product or service. Eco-labelling signifies the using of labelling systems "to inform consumers that a product is determined by a third party to be environmentally friendlier relative to other products in the same category."[657] The information on the label usually is comprehensive covering also the PPMs-related aspects.[658] Eco-labelling could thus influence consumer preferences in the market thereby giving the otherwise "like" goods competitive advantage over others in the same category.

As an information tool, eco-labelling systems are used to promote GPP.[659] This fact has also been underscored by a study by UNEP[660] which used the US Energy

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to the recommendations of the *Advisory Commission on Intergovernmental Relations Report, Building Codes: A Program for Intergovernmental Reform*. NCSBCS represents, on a national level, the states' building codes and public safety concerns, Available at: http://www.showroom411.com/SiteBrowser.aspx?&uid=-1&url=http%3a%2f%2fwww.ncsbcs.org%2f (last visited 04/11/08).

[657] Goodland, R., *Eco-labelling: Opportunities for Progress Towards Sustainability,* (Consumer Choice Council, Washington DC, USA, 2002), p. 2; UNCTAD, *Trade, Environment and Development, Aspects of Establishing and Operating Eco-Labelling Programmes;* Report of the UNCTAD secretariat (TD/B/WG.6/5); (Geneva, 1995) cited by Gröge, S., *Ecological Labelling and the World Trade Organization* (Discussion Paper No. 242) Berlin, February 2001

[658] See Australian Government, *Market-based for natural resource management (NRM) change,* (Designer Carrots) available at: http://www.marketbasedinstruments.gov.au/WhatisanMBI/tabid/66/Default.aspx (accessed on 24/10/09).In fisheries, essentially, eco-labelling is PPM's-based. This is because the product itself is fish, which everybody knows. What is at issue is the process by which it is produced.

[659] See Announcement of Green Purchasing Sendai Declaration: Chair of the Steering Committee of the 1st International Conference on Green Purchasing in Sendai, 6-7 October, 2004, Sendai, Japan, available at: http://www.city.sendai.jp/kankyou/kanri/icgps-e/report/sendai_e.html

Star[661] as an example. The study stated that the US Energy Star proved an effective tool for the US government to inform suppliers that it had integrated energy efficiency into public procurement contracts system.[662] In the same manner, product suppliers were able to communicate to the US government that "their products deserved preferential treatment in [the] procurement decisions."[663] Indeed GPP strategies in such countries as the EU and Canada have relied most heavily on national eco-labelling programs. In Canada, the most influential eco-labelling system is Canada's Environmental Choice Program (ECP).[664] This is also the "North America's largest, most respected environmental standard and certification mark".[665]

The utility of eco-labelling is founded on the neoclassical economic theory which assumes that "perfect information is required for the efficient operation of economic markets."[666] This means in order to help consumers make rational decisions in their purchases, government should help them to access information relevant to their decision-making.[667] Thus government-mandated eco-labelling scheme fulfils just this objective. It also highlights the fact that consumer preferences are influenced not only by price or health and safely factors but also environment- friendliness and

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[660] Rotherham, T., *The Trade and Environmental Effects of Eco-labels: Assessment and Response,* 11 (UNEP, 2005).

[661] See *Energy Star* at http://www.energystar.gov/index.cfm?c=about.ab_index (last accessed 24/10/08). See also *supra,* notes 653.

[662] See Rotherham, *supra,* n. 660.

[663] *Ibid.*

[664] See Legault, L., *Towards Greener Government Procurement: An Environment Canada Case Study,* p. 8, available at http://www.apo-tokyo.org/gp/e_publi/gsc/0305RES_PAPERS.pdf (last visited 03/03/10), pp. 53-53.

[665] See *EcoLogo Programme* at http://www.ecologo.org/en/ (last visited 17/06/10).

[666] US EPA, *Determinants of Effectiveness for Environmental Certification and Labelling Programs,* (Pollution Prevention Division office of Pollution Prevention and Toxics U.S. Environmental Protection Agency, Washington, DC, April 1, 1994), p. 1, available at: http://www.p2pays.org/ref/17/16863.pdf (last accessed 28/10/08).

[667] *Ibid.*

social factors related to the product or its production processes.[668] Hence, at the Earth Summit, governments agreed to "encourage expansion of environmental labelling and other environmentally related product information programmes designed to assist consumers to make informed choices."[669]

6.2.2.6 Relationship between standards, eco-labelling and technical regulations

The relationship between eco-labelling on the one hand and standards and/or technical regulations on the other, could be seen in the fact that eco-labelling consists of the information about the standards used in the manufacturing or production of a product or service. On the other hand, the use of particular eco-labels may have been required by specific national regulations. Thus, depending on their purpose, eco-labels which derive from standards are "complementary to … standards and regulations."[670] Therefore, using eco-labelling as a basis of technical specifications in GPP means looking at the standards mentioned for the product, service or processes covered by the labels. Thus, it is for the product producers to ensure their product standards have qualified and hence acquired certification by an eco-labelling scheme, so as to attract buyers for government.[671]

6.2.2.7 Technical specifications: performance-centred

By virtue of GPA Art. VI:2(a), technical specifications should be aimed at specifying goods and services that will "perform" the job, and should not be unduly concerned with the "design or descriptive characteristics" of the goods or services. A question

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[668] Deere, C., *"Eco-Labelling and Sustainable Fisheries,"* (IUCN-The World Conservation Union and the Food and Agriculture Organization of the United Nations (FAO), 1999), p. 4.

[669] Agenda 21, Paragraph 4.21 of UNCED, 1992 *supra,* n. 60.

[670] Syunkova, A., *WTO – Compatibility of Four Categories of U.S. Climate Change Policy,* (National Foreign Trade Council, 2007) available at: http://www.nftc.org/default/trade/WTO/Climate%20Change%20Paper.pdf (accessed: 25/06/07).

[671] For details on how international standards and eco-labelling interact, see generally the *WTO World Trade Report 2005, supra,* n. 621.

then arises as to the stage at which the "performance" attribute of the goods or services is determined, namely, whether at the *production* or *consumption* stage of the product life-cycle? Naturally the performance is actualised at the consumption stage.[672] Of course, the production stage similarly could and does play a decisive role on how the product performs. The distinction between the production and the consumption stages of the life-cycle of a product or service is relevant in the context of the arguments for or against the permissibility of consideration of non product-related PPMs under the WTO system.[673] It is also one of the areas that attract much controversy in international environmental policy-making.[674]

In terms of services procurement, the question that arises is the extent to which a procuring authority can specify a particular manner in which a service should be performed where the same service can effectively be performed in different ways. With respect to environmental services, an example of a typical situation was cited earlier, of a procuring entity in need of local transport facility, to require the supplier to use not only climate friendly bus fleet, but also use electricity generated from renewables sources or biofuels generated/procured from sustainably managed biomass. In this case, in addition to the determination of the relevance of those conditions to the firm's capability to perform the contract, the usual PPMs rules apply, namely, PPMs are relevant only when they are product-related.

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[672] See Kuzlik, P., *International Procurement Regimes supra,* n. 170, p. 109.

[673] PPMs are discussed infra, section 6.4.

[674] For discussions on aspects of this controversy, see Knill, C., *Environmental Policy,* in Peters, B. G., Handbook of Public Policy, London Sage Publ, 2006, 251 http://www.loc.gov/catdir/enhancements/fy0657/2005934841-d.html (accessed: 14/02/09).

6.3 GPP and technical conditions for supplier participation

6.3.1 The basic rules for setting supplier qualifications

Conditions for supplier participation are requirements or qualifications that prospective suppliers should fulfil in order to qualify for participation or to tender in a particular procurement exercise.[675] Generally, the type of procurement/tendering procedure adopted determines the kinds of conditions that a procuring authority would require the participants to fulfil. Conditions for participation may be general administrative requirements, as required by other relevant legislation or policies. They may take the form of fulfilling requirements of the law relating to establishment and/or operation of companies, income tax, business practices, company's solvency and financial viability; mandatory insurance policies/levels and other relevant licences. They may also relate to professional accreditations or registrations, compliance with draft contract terms, and compliance with conditions of tender.[676] Indeed, conditions for participation may also relate to the job at hand. For examples, companies may be required, for the purpose of a particular procurement, to have a specified level of share-capital or possess certain types of expertise or equipment. Failure to satisfy conditions for participation may result in excluding the firm's bid.

It is possible to also implement GPP through the conditions for supplier participation. This occurs where a procuring entity inserts environment-related technical qualifications for the participation of suppliers in tendering process. The basic rules of setting conditions for supplier qualification, pursuant to GPA Art. VIII, are that:

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[675] See Arrowsmith, S., *supra,* n. 51, Chapters 9 – 11.

[676] *Ibid.*.

1) entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties.[677]
2) conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question.[678]

These rules essentially re-emphasise the observance of the non-discrimination and transparency requirements when setting the conditions. Indeed Art. VIII further elaborates that supplier conditions for participation to be imposed by procuring entities should be determinable by "the financial, commercial and technical capacity of the supplier,"[679] to execute the job in question, not all jobs. For the purpose of implementing GPP, such technical conditions may include the supplier's compliance with, or being certified by, a certain international standardisation body or system for environmental protection or energy efficiency. Such a condition will be objectionable under Art. IX:9 of the GPA if it is unrelated to the technical ability of the supplier to perform the contract at hand.[680] Thus, suppliers should not be burdened with technical conditions of participation that are irrelevant to the particular procurement, as this may put some of them at an undue disadvantage, and consequently result in de-facto discrimination against them. Thus where in GPP process, the procuring authority requires potential bidders to be ISO 14001 EMS-certificated, unless this requirement could be linked with the supplier's technical ability to perform the contract, this will be invalid pursuant to GPA Art. VIII(b).[681]

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[677] GPA Art. VIII:(a)

[678] *Ibid.* (b)

[679] *Ibid.* (b)

[680] See *supra,* Chapter 5, Section 5.2.1.2.

[681] See also *infra,* Section 6.5 BSI, *A Quick Guide to ISO 14001,* available at http://www.bsi-emea.com/Guidance+Documents/PDFs/EMSQuickGuide.pdf. For a brief on EMS and ISO framework see generally, the ISO website: www.iso.org

6.3.2 Technical specifications, supplier qualification and award criteria

Technical specifications, supplier qualifications and contract award criteria are inter-woven. Award criteria are those issues usually pre-determined and included in the technical specifications section of the tender, by the procuring entity, against which tenders are evaluated and points given, so that, at the end of the evaluation, the tender with the highest points wins the contract. This is more the case in GPP where technical qualifications of the supplier may constitute a necessary part of its tender.

For instance, a firm that has been certified for EMAS will be able to show how it fulfils the conditions for award of a GPP-related contract more readily than another firm not so certified. On this, what readily comes to mind is the ECJ case of *Evn AG and Wienstrom Gmbh v. Austria/Stadtwerke Klagenfurt AG*[682] where the appellants argued before the Austrian Federal Procurement Review Commission, inter alia, that the proof of suppliers' ability to ensure compliance with the technical specifications of the product and services (supply of electricity generated from renewable sources) should not be used also as basis for selecting tenderers.[683]

In that case, part of the contract award criteria required by procuring authority was that the suppliers should show capability to produce electricity from renewable sources. However there was no mechanism set in the tender documents to assess the extent of the observance of this condition. There was therefore no way of assessing compliance. That meant the contracting authority would arbitrarily make this determination, which would of course result in disqualifying some tenders. Hence, in the view of the appellants, this condition should not be used as a basis for

[682] *Case c-448/01, Evn AG and Wienstrom Gmbh v. Austria/Stadtwerke Klagenfurt AG* ECJ 4 December 2003 (hereinafter: *"Evn AG case")*. For summary report see [2003] All ER (D) 81. Full report is available at the website of the ECJ: www.curia.eu.int. .

[683] See also Bowsher, M., *The ECJ, transparency, and procurement as an environmental policy: Evn AG & Wienstrom GmbH v. Austria* (2004) 21(2) International Construction Law Review 189-196, at p. 190.

selecting qualifying tenders. The ECJ held inter alia that contracting authorities should not set an award criterion which confers an "unrestricted freedom of choice on the purchasing authority".[684] To allow this type of criterion would work against the transparency objective of the Common Market.[685]

On award criteria, the GPA Art. XIII:4(b)[686] says:

> … the entity shall make the award to the tenderer who has *been determined to be fully capable of undertaking the contract* and whose tender, whether for domestic products or services, or products or services of other Parties, is either the *lowest tender* or the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the *most advantageous*.

Thus, going by this provision, award should be made to a tenderer who:

1) is capable of undertaking the contract *and*

2) is either:

   i. the lowest tender; or

   ii. the tender which in terms of the specific evaluation criteria set forth in the notices or tender documentation is determined to be the most advantageous.[687]

On the issue of what constitutes "the most advantageous tender" that forms the basis of contract award, the provisions of the GPA and the position of the EU law and policy are comparable. While under the GPA Art. XIII:4(b) the award is made to either the lowest tender or the "most advantageous", those of the EU require the

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[684] See *Evn AG* case, *supra*, n. 682, paras. 69 and 94.

[685] See Bowsher, M., *supra,* n. 683, p. 193.

[686] (Emphasis added) See also Art. XIV:1(b) on Negotiated tendering process applying, inter alia, *"when it appears from evaluation that no one tender is obviously the most advantageous in terms of the specific evaluation criteria set forth in the notices or tender documentation."*

[687] For an overview on the creation, purpose and achievements of the EU Single Market see *European Commission report 'It's a better life - How the EU's single market benefits you', 2002,* available at http://ec.europa.eu/publications/booklets/move/35/en.pdf

award to be made to the "most economically advantageous" tender. What is still in controversy is what are the perimeters for determination of the "advantageous (economically) tender", but more so the extent to which environmental considerations could be used as part of the elements for that determination.

The recurrent question has been: what if such a consideration results in preferences being given to products and services on the basis of non-PR PPMs? This and similar questions brought about controversy and disputes in the EU procurement system. These disputes then, among other things, led to a major review of the EU system which culminated in the promulgation of the new public procurement directives in 2004.[688] This aspect is discussed in section 6.6 on the comparability of the EU procurement system with the WTO GPA.

6.4 GPP and the PPMs Question

Chapter 3 it was indicated how government procurement was used traditionally as an instrument of protectionism, making it among the five most notable of the non-tariff measures that constituted a barrier to international trade. Although the Tokyo Round Government Procurement Code (and subsequently the WTO GPA) intervened, GP still remained an avenue by which countries hide and perpetrate protectionism, either overtly or covertly. The essence of the GPA in giving prominence to international standards to serve as basis for technical specifications is to minimise the protectionist effect. The GPA definition of a standard and eco-labelling includes the PPMs. However, even where an international standard is "appropriate", an international environmental or energy efficiency standard, used for GPP is usually based not on the characteristics of the product or services in question, but on their PPMs. This brings to relevance the PPMs debate over issues

[688] See *infra,* Section 6.4.1.3

related to environmental labelling and trade.[689] Indeed, the definitions of international standards and national technical regulations describe the products as well as their related PPMs.

In view of the significance of the question of PPMs in the determination of what the appropriateness of international standards for the purpose of technical specifications in tendering, it is considered necessary to give an insight on what PPMs really are and how they raise issues in international trade law. But the PPMs question is particularly relevant for the determination of likeness of products and services for the purpose of application of the non-discrimination rules of the GPA.

6.4.1 What are PPMs?

PPMs are the methods used in processing raw materials and producing products and/or services which are the subject matter of the transaction. PPMs signify a situation where, in considering the nature of a "product" or "service", which is the subject-matter of the regulation or dispute, not only the physical composition of the product or service itself is taken into account, but also those processes that were undertaken in the course of its manufacturing/production. This consideration can include the methods of harvesting of the product, or the manner of the performance of the service. This is what is referred to as the whole life-cycle consideration of the product. These processes take different form depending on the product in question. Where the product or service or its PPMs is harmful to the environment, then its use results in an externality, namely, an additional cost to the environment. It will take the tax-payer intervention to remediate this externality.

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[689] The debate has engaged the OECD, UNCTAD, UNEP and, of course, the WTO. See Polak, J., *Trade as an Environmental Policy Tool?, Global Eco-labelling Network (GEN), Eco-labelling and Trade,* WTO/GEN symposium on*, Eco-labelling: Trade Opportunities & Challenges Ahead on the Road to Cancun*, June 16-18, 2003) available at: http://www.wto.org/english/tratop_e/dda_e/symp03_gen_ecolab_e.doc. See also a brief on the debate in Chapter 2, section 2.2.1-2.2.2.

Thus, in environmental policy-making such an externality should be the responsibility of the producer or user the product or (the provider of) the service causing the damage or to whom the service is rendered. Such cost is supposed to be "internalised", that is included in the cost of the production, so that the use the product or enjoyment of the service is compensated for up-front, and this saves the tax-payer's money. Therefore, products or services that entail more serious environmental consequences in their PPMs including their end use and disposal make a world of difference from other similar products or services that do not have such consequences. This distinction is regardless of whether these negative environmental consequences are related to the production (PPMs) of the products or the end-used and disposal of the product. This is the basis of the idea of inserting specifications that favour purchase of the environment-friendly products as against others not so friendly.

In trade law and policy, however, where two products differ only in their PPMs, the difference is taken into account only of it is product-related. Now the determination of the distinction between PPMs that are "product-related" and those that are non-product related (non-PR) becomes crucial. PPMs are product related where they are discernible in the physical characteristics of the product in its final form (at consumption stage). The common example of product-related PPMs is pesticide residue seen on farm produce at consumption level: the produce tastes differently and it takes longer time in its good/usable state than product not sprayed with pesticides. Thus, differential treatment is permitted as between similar products where the PPMs are discernible in the characteristics of the products at the final/consumption stage.

On the other hand, non-PR PPMs are those PPMs that cannot be discerned in the final product or service. Trade restriction or discrimination of any form is not

permitted in respect non-PR PPMs. Early analysis of trade restrictive measures regarding these types of PPMs concern import bans on goods produced by a monopoly, goods made from prison-labour, copyrighted materials or goods inimical to public health.[690] Thus an energy-efficient computer is not distinguishable in its physical characteristics or in the way it performs the usual functions of a computer, from one which is not.

This product/process distinction has generated heated controversy among trade lawyers and economists. Indeed, "PPMs" has been described as "the most debated set of letters in the trade law history."[691] The PPMs debate was popularised in the aftermath of the GATT *US – Tuna/Dolphin* decisions in the early 1990s.[692] The logic of trade law in distinguishing between product-related and non-PR PPMs is that if non-PR PPMs are allowed to serve as basis of differential treatment between otherwise like products, then it won't be possible to draw a clear line between measures taken unilaterally for genuine concerns (e.g., environmental protection) and those that are simply protectionist. Thus, it would be impossible, according to Jackson, to prevent abuses where WTO Members maintain trade-restricting measures tied to PPMs.[693] It will result into "a slippery slope which no one is able to control.[694]

Thus, as relates environment-related PPMs, the main areas of the controversy are: firstly, the uncertainty associated with non-PR PPMs related to environment for the purpose of policy making, and trade law discipline. That is to say how to distinguish

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[690] See Charnovitz, S., *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*', 27 Yale J Int'l L (2002) 59-110, at 60 n. 2, with extensive further references.

[691] UNEP/IISD, Environment and Trade –A Handbook (2nd Ed.), (UNEP, 2005), p. 53.

[692] See *supra,* Chapter 2 Section 2.2.3

[693] See Jackson, H. J., *Comments, supra,* n. 157, p. 304.

[694] *Ibid.*

a legitimate policy objective and protectionism as the basis of the PPMs measure. A related issue is the extent to which unilateral PPMs-based measure (e.g., a country's harvesting method of a product) could be allowed to have extra-territorial effect. In other words how country A could be allowed to imposed its harvesting methods (PPMs) on country B as a condition for accepting B's products in its (A's) territory.[695] On this second point, Jackson suggested that even the AB statement in *US – Shrimp* that seemed to conclude that extraterritoriality could be a common feature in all PPMs based measures that could fall under the Article XX exceptions, used the word "may".[696] This denotes uncertainty of the type that generates debates. Chapter 2 did allude to some of the controversies between publicists on this question.[697]

6.4.2 PPMs and the GPA provisions on technical specifications

It could be recalled that the GPA definition of standards and national technical regulations document, for the purpose of setting technical specifications, includes the description of the "characteristics for products or services or related processes and production methods".[698] Procuring authorities thus are permitted to include PPMs in setting their product descriptions. These however should be "related PPMs". This thus does seem to merely confirm the traditional position of the WTO position which allows only product-related PPMs as defined above, to serve as reason for differential treatment between otherwise like products.[699]

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[695] *Ibid.*, p. 306.

[696] *Ibid.*. The AB words in para. 121 of the ruling are:

> It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member *may,* to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. (emphasis mine)

[697] See *supra,* Chapter 2, Section 2.2.3

[698] Art. VI:2(b)

[699] *Ibid.*. See Esty, D. C. *supra,* n, 70, p. 221

The real problem is where these requirements favour domestic suppliers who are already familiar with their country's national environmental priorities and regulations. This state of affairs may impose more difficulty on competing suppliers who are based in, or originate from, other countries with lax environmental regulations, and hence, the standards of their production methods generally lower than required by the contracting authorities.[700] Developing countries, in particular could find themselves effectively shut off from participation in the procurement processes as described above.[701] Although, on the other hand, as some empirical researchers have discovered, standards have helped developing countries to improve the quality of their productions especially in agro-food export areas.[702] With this reasoning, some commentators support the idea that international standardization of PPMs, and eco-labelling schemes could help to bridge the dividing line in the trade-environment debate.[703] Similarly affected are small and medium-sized enterprises (SME) that find it too costly to abide by environmental regulations of say, facility up-grading and installation of GHG emissions filters, or to minimise pollution by waste water from manufacturing facility. Some such SME also may not be able to bear the cost of eco-labelling certification and licensing.[704] Admittedly, the trade effects of such requirements apply generally to all suppliers in the industry. However where such trade effects disproportionately affect foreign-based suppliers more than domestic suppliers this may give rise to de-facto discrimination.

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[700] See supra, the hypothetical example provided in chapter 2, section 2.2.1, pp 22-23 and n. 72.

[701] See Kunzlik, P., *supra,* n. 170.

[702] *Ibid.*, p 12. See for instance, Jaffee, S. and Henson, Spencer, *Standards and Agro-Food Exports from Developing Countries: Rebalancing the Debates* (World Bank Research Working Paper 3348, June 2004). The paper re-examines the stereotype belief that international standards requirements are automatically a barrier against developing country market access, and suggests the potential of standards to serve as a "catalyst" to enhance market access for developing countries.

[703] Staffin, E. B., *supra*, n. 103, p. 209.

[704] See Legault, L., *supra,* n. 664, p. 8.

6.5 GPP as de-facto discrimination

6.5.1 The WTO non-discrimination norms and the "likeness" question

A marked difference existing between the GATT and the GPA provisions on non-discrimination is that while the GATT Art. III prohibiting less favourable treatment against foreign "like" products,[705] the GPA for the same discipline conspicuously avoids the "like" term. Attempts to get to know why the GPA omitted the *like* term was not fruitful.[706] Indeed, this term is prevalent in almost all the WTO Agreements[707] but the GPA. This omission started at the outset of the negotiations for the 1979 GP code. This is observable in the initial integrated GP draft which was prepared by the GATT Secretariat based on earlier proposals from, inter alia, OECD documents and practice, which also served as the basis for negotiations.[708] The omission of this term from the GPA is rather absurd in the sense that the very notion of discrimination in the treatment of two objects implies comparability of the objects based on a certain specified benchmark. Hence, the notion of "likeness" is arguably

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[705] Other terms with the same connotation encountered in the GATT are "like commodity" and "like merchandise." In GATS, the expression is "like services and service suppliers". See GATS Art. II:1 on MFN.

[706]. See part of the efforts, namely, contacts with the Secretary to the Committee on Government Procurement, at Appendix VI hereto

[707] Jackson lists 10 GATT provisions with the *likeness* term. These are: I:1, II:2(a), III:2, III:4, VI:1(a) and (b), IX:1, XI:2(c), XIII:1, XVI:4, See Jackson, J., World Trade and the Law of GATT, *supra,* 277, p. 259, n. 1.. Similarly, according to the 1970 Working Party on Border Tax Adjustments the phrase "like or similar products" appeared 16 times in the text of the General Agreement. GATT, BISD, 18th Supp. 97, 101 (1972). See Hudec, R. E., *"Like Product": The Differences in Meaning in GATT Arts. I and III,* p. 1 in *Cottier, T. & Mavroidis, P. (eds.),* Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, (University of Michigan Press 2000) pp. 101-123.

[708] GATT, *Draft Integrated Text for Negotiation on Government Procurement (Note by the Secretariat)* (MTN/NTM/W/133/Rev.1). See Part II:1 on *national treatment and non-discrimination* with no "like" term, thus:

> With respect to all laws, regulations, procedures and practices affecting government procurement, covered by this Agreement, signatories shall provide immediately and unconditionally to the products and suppliers of all signatories offering products originating within the signatory countries! Treatment no less favourable than:
>
> (a) that accorded to domestic products and suppliers; and
>
> (b) that accorded to products and suppliers of any other signatory.

inherent in the idea of non-discrimination.[709] The explicit exclusion by the GATT Art. III of GP from the reach of GATT would have made the mention of the "likeness" term in the GPA Art. III on non-discrimination even more necessary. This would have avoided the lacuna which the omission has now created.

Noteworthy also is the fact that despite the mention of "likeness" in several provisions of the WTO Agreements it was nowhere defined, hence, the difficulty encountered by GTT/WTO dispute settlement Panel in interpreting it. Thus, the term became as much a controversial concept as the PPMs discussed earlier. This difficulty is accentuated by the use of another term "like or competitive products" used in GATT Art. Art. XIX:2, which seems to widen the coverage of the term.

Determination of "likeness" of products or services is essential for the operation of the GAT/WTO system which essentially enforces non-discrimination and equal treatment of products/services traded by the WTO Members. Tariff nomenclature and classification help to identify classes of products for the purpose of tariff negotiations, and scheduling by WTO Members.[710] This classification in a way helps to also define products likeness. However, there is still the need for parameters to identify when two products bear similar characteristics as to be classified same or different.

In this regard, to determine likeness of products Panels have frequently cited the *Report of the 1970 Working Party on Border Tax Adjustment*[711] as a guide. This report first stated that problems arising from the interpretation of the term should be examined on a "case-by-case basis". This will allow "a fair assessment in each case

[709] This view was also endorsed by van Calster. See Van Calster, G., *supra,* n. 38. p. 301.

[710] See Jackson, J., *supra,* n. 277, p. 238 and 259.

[711] See Working Party Report, *Border Tax Adjustment,* adopted 2 December 1970, BISD 18S/97. The 1970 BTA Working Party reviewed the application of GATT Art. III.

of the different elements that constitute a "similar" ["like"] product." It then suggested some guiding criteria for making this determination, namely "(i) the product's end-uses in a given market; (ii) consumers' tastes and habits, which change from country to country; (iii) the product's properties, nature and quality."[712] But the Panel in *Spain- Unroasted Coffee*[713] did not use *consumers' tastes and habits,* criterion it introduced "tariff classification" regimes of other WTO Members as additional criterion for determining likeness within the meaning of GATT Art. I:1.

Similarly, the AB in *E.C.-Asbestos*, faced with determining whether different Asbestos products were "like" under Art. III:4, referred first to a dictionary meaning of the term "like", which suggested that "like products" were products that shared a number of characteristics. The AB, emphasising also the "case-by-case"[714] approach, suggested that three questions of interpretation need to be resolved in order to determine like products, thus:

1) which characteristics or qualities are important in assessing "likeness";
2) to what degree or extent must products share qualities or characteristics in order to be "like products"; and
3) from whose perspective should likeness be judged?[715]

Generally however, the PPMs used in the production of the goods or products, or performance of the services in question, played a decisive role in how products and services are regarded as "like" or "unlike". Hence, the fact that green and conventional electricity are physically the same in terms of physical design and

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[712] *Ibid.* at para. 18.

[713] See *Spain - Tariff Treatment Of Unroasted Coffee 1981 GATTPD Lexis* 5 (Report of the Panel adopted on 11 June 1981) *(L/5135 - 28S/102)*

[714] *E.C.-Asbestos (ABR),* para. 101. See also Steenkamp, L., *Complexities and inadequacies relating to certain provisions of the General Agreement on Trade in Services (GATS),* available At http://wto.tralac.org/pdf/WP_1_04_-_Complexities_and_inadequacies_relating_to_certain_provisions_of_the_GATS.doc (visited 11/08/07)

[715] *EC – Asbestos (ABR)*, para. 92.

characteristic as well as performance may or may not necessarily make the two the same thing if the PPMs are taken into considerations, and this thus determines what rules are applicable to interpret the two. At production level, the two types of electricity are different, but are "like" at consumption level. However, in the case of energy efficient computers for use in public offices, these may be different both from the perspective of the PPMs (produced through cleaner and more energy efficient processes), as well as "consumption" level, namely how they actually perform (consuming less electricity than other computers in the same category). So they are not *like* at all levels.

Thus, the omission of likeness term from GPA was, according to Van Calster,[716] probably intended to avoid the controversy and complication experienced by various GATT/WTO judicial Panels in determining the meaning of the term, especially in the interpreting the GATT Art. III on national treatment. Indeed, rather than questioning the wisdom behind the WTO negotiators for this omission, it is safer to up-hold Van Calster's assumption that the likeness notion is implicit even if not expressly mentioned. This presumption also helps to ensure consistency in the WTO jurisprudence. This is especially so, as the issue concerns the basic norms and objectives of the multilateral trading rules, namely, national treatment and non-discrimination. Indee, implying "like" term is justifiable under the principle of effectiveness of treaty interpretation (*ut res magis valeat quam pereat*) as codified under the VCLT Art. 31. This principle requires, as the AB puts it, that "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility" (pursuant to the principle of effectiveness:[717]

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[716] *Ibid.*

[717] *US – Gasoline (ABR), supra* note 31, at 23, confirmed in, inter alia, *Japan —Taxes on Alcoholic Beverages (ABR)II,* supra n. 24 ps. 12 and 18.

The GPA thus prohibits discriminatory effects of preferential procurement practices because these practices "can act as protectionist measures, thus limiting import competition and introducing distortions that limit choices, increase prices and discourage economic efficiency."[718] These concerns are heightened where the procurement exercise pursues objectives other than those for "value for money". Such objectives as environmental protection often also undermine transparency, which is a key feature of many procurement processes.[719] In order to give effect to these obligations, the Agreement under Arts. VII to XVI makes detailed provisions on the need for transparency in the conduct of their procurement practices. These norms have been discussed in details in chapter 3.

6.5.2 When GPP constitutes a de-facto discrimination

In practices, GPP measures are essentially de-facto, as countries do not expressly state the country of origin for the green products and services required, or the nationality of the environmentally-qualified service supplier. Similarly, countries do not expressly provide for the purchase of the green goods from domestic market or manufacturers, or employ only local suppliers for the job.[720] Discriminatory effects of GPP measures are rather experienced from the implementation of the legislation or measures. The existence of evidence of discrimination or protectionism in a measure is the decisive issue.

The perceived GPP de-facto discrimination is based mainly on the adoption in GPP practice of international standards, national regulations and eco-labelling schemes for environmental protection purposes. Where the use of such elements result in

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[718] See OECD, The Environmental Performance of Public Procurement: Issues of policy coherence, p. 107. (By Johnstone, N., 2003), p 107.

[719] *Ibid.*

[720] See for instance, Section 1605(a) of the *America Recovery and Reinvestment Act of 2009* which expressly requires government authorities to spend the economic recovery money on American goods only. See *supra,* Chapter 3, Section 3.3.1.

disproportionately costlier and thus harder effects on foreign producers, manufacturers or suppliers because of their lax environmental regulatory regimes and experiences, then GPP may result in discrimination. This situation is illustrated by *US – Autos* case.[721] The issue before the GATT Panel was whether the US "luxury" and "gas guzzler" taxes imposed on certain type or class of automobiles violated GATT Article Art III:2 . This Art. inter alia requires a national treatment in the internal taxation system charged on products traded in the domestic market of a GATT contracting party.[722] The so-called luxury and gas guzzler taxes were imposed by the US with a view to encouraging manufacturers to produce more energy efficient cars. The taxes were imposed uniformly on specified classes of cars regardless of the origin of the cars or their manufacturers. However, the EC and Sweden argued inter alia that the taxes discriminated against European manufacturers who bore a disproportionately greater burden of the taxes because they happened to be manufacturers of the class of automobiles subject to the taxes. The Panel found that as the tax measure was *origin-neutral*, and not imposed "so as to afford protection to domestic production", it was GATT-consistent.[723] This also meant that where a discriminatory effect of a measure is of a de-facto nature, then the Panel would look at the measure's aim and the effect in order to determine violation of Article III.[724] The Panel in this case similarly accepted the argument that even if there would be any violation of Article III, then in so far as the taxes in question were based on a legitimate policy objective, then GATT Art. XX (b) and (g)

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722 Article III:2, first sentence, states:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

723 *US – Autos (Panel),* para 5.10

724 *Ibid.,* para. 5.10

exceptions (in this case, for energy conservation and environmental protection) would be relevant.[725]

The point here is tha an origin-neutral measure which is discriminatory on a de-facto basis is regarded on equal terms under the WTO jurisprudence as de-jure discrimination.[726] Hence countries are entitled to the same level of protection against such measures as in the case of de-jure measures. In the same token, Parties maintaining such measures would have to bear the same level of the burden of proof in their defence.

6.6 The EU GPP system and its compatibility with the GPA

This section seeks to highlight the EU GPP system and: (1) how it compares with the GPA provisions, but more specifically, and importantly to for this study, (2) how compatible it is with the GPA. The purpose is to establish the real life meaning, objectives and practice of green procurement, and examine the likely legal issues a GPA party like the EU may encounter in its GPP processes. The choice of the EU The discourse under this section however is not intended to be exhaustive, as the author has published a paper on the subject where more details could be found.[727] Chapter 1 has identified the reasons for adopting the EU system for this illustration.[728]

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[725] *Ibid.,* para. 5.38

[726] See McCrudden, C., *supra,* n. 523.

[727] See Malumfashi, G. I., *Procurement Policies, supra,* n. 11.

[728] See Chapter 1, Section 1.5.2.

6.6.1 GPP under EU law and policy: overview

6.6.1.1 Public procurement, the EU Single Market and climate change

Public procurement is one of the major instruments used by the European Commission to open up the European Single Market.[729] The EU single market is an integrated economic system where the policies are crafted so as to pursue various economic and development objectives simultaneously, seeking to balance competitiveness, the environment and external relations.[730] Thus, one finds the EU energy policy also addressing environmental protection and climate change mitigation. In the same way, the EU GPP is closely related to the climate change objectives and policies, just as the EU policy on biofuels is also targeted at climate change mitigation.[731] Generally, however, integrating environmental considerations in other government policies is a basic requirement of the so-called "Integration Principle" enunciated in Art. 6 of the EU Treaty.[732] This principle requires that environmental protection should be integrated in all policies of the Community. This principle, it could be recalled, is one of the foundations of the Agenda 21 adopted at Rio de Jenairo, at the UNCED.[733]

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[729] For a brief on the EU Single Market, its purpose and principle as well as achievements so far, see *European Commission report 'It's a better life - How the EU's single market benefits you', 2002* available at: http://ec.europa.eu/publications/booklets/move/35/en.pdf (last visited 20/06/10).

[730] See generally, Murphy, D., (et. al), *Furthering EU Objectives on Climate Change and Clean Energy: Building partnerships with major developing economies* (IISD, 2008). See also *Climate Change and Foreign Policy: An exploration of options for greater integration* (IISD, 2006). These are studies about the EU's engagement with the developing world to explore all available opportunities for EU to perform its commitments to the climate regime. Available at http://www.iisd.org/pdf/2008/eu_objectives_climate.pdf (last visited: 20/06/10).

[731] See for instance, *Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport.* Art. 1 of this Directive explicitly states that the Directive is aimed at: *promoting the use of biofuels or other renewable fuels to replace diesel or petrol for transport purposes in each Member State, with a view to contributing to objectives such as meeting climate change commitments, environmentally friendly security of supply and promoting renewable energy sources*. See OJEU, 17.5.2003.

[732] See *supra,* Chapter 1, Section 1.5.2, n. 56. See also Usui, U., *The Principle of Environmental Integration in the European Union: From a Discursive Constructivism,* Niigata University of International and Information Studies, *Bulletin of Niigata University of International and Information Studies, Vol. 8, pp. 89-117.*

[733] See UNCED, *supra,* no. 60.

Indeed, in view of the EU's ambitious climate commitment under the KP,[734] GPP is regarded as essential policy tool to contribute to the EU' efforts to meet its obligations under the climate regime. The EU, in the main, regards the energy sector as essential area of focus for its government procurement. This is of course in view of the contribution of the energy sector to the global GHG emissions.[735] The climate change benefit of green procurement has been underscored by a study conducted between 2001 and 2003 for the European Commission, which shows, for instance, that "if all public bodies in the EU switched to green electricity,[736] they would avoid more than 60 million tonnes of CO_2 emissions per year, thus contributing towards 18% of the EU's Kyoto target."[737] Earlier on, the EU had aimed to have renewable energy sources providing 21% of electricity by the year 2010.[738]

This potential of green electricity to benefit EU climate change policy had since 2001 been recognized by the ECJ, in a proposition which directly linked the green energy procurement policies of the EU with the EU's GHG emissions reduction efforts pursuant to the climate change regime. The ECJ stated thus:

> The use of renewable energy sources for producing electricity…… is useful for protecting the environment in so far as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat. Growth in that use is amongst the priority objectives which the Community and its Member States intend to pursue in

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[734] EU accounts for about 15% of the global GHG emissions and have committed to reduce its emissions with

[735] See *supra,* Chapter 4, Section 4.3.1.

[736] See Directive 2001/77/EC for the definition in Art. 2(c) of "green electricity," thus: *'Electricity produced from renewable energy sources shall mean electricity produced by plants using only renewable energy sources as well as the proportion of electricity produced from renewable energy sources in hybrid plants also using conventional energy sources …'*

[737] See EC, Buying Green! *supra,* n. 168, p. 5.

[738] See the EU Commission communication: *The support of electricity from renewable energy sources,* which also prominently mentioned "Improved security of energy supply" and "mitigation of greenhouse gas emissions by the EU power sector" among the targeted benefits that **"**increasing the share of renewables in the EU electricity" will bring about.

implementing the obligations which they contracted by virtue of the United Nations Framework Convention on Climate Change.[739]

It was this ruling that gave impetus to the subsequent rulings in two other cases discussed later in this section. The cumulative effect of these decisions heralded a fundamental shift in the EU law and policy for green procurement in that it inspired the codification of GPP in the subsequent Directives. Consequently, it became part of requirements in the energy procurement system of the EU to ask suppliers to ensure a certain percentage of their electricity is generated from carbon-neutral (renewable) sources.

6.6.1.2 EU law and Jurisprudence on GPP

On the legal aspects of the EU GPP, prior to the judgement in *Concordia Bus Finland* case,[740] the position of the law on public procurement was that contacting authorities, subject to certain conditions, could also consider environmental criteria in deciding which tender is the "most economically advantageous" pursuant to applicable procurement directives. The conditions include cases where reference to such factors would financially benefit the contracting authority, and the environmental award criteria relate to the nature of the job to be done.[741] That is to say such considerations were permissible only if the organiser of the tender (procuring authority) stands to gain "an economic advantage attributable to the product or service which is the object .of the procurement."[742] The law however

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[739] See *Case C-37998 PreussenElectra AG v. Schhleswag AG,* in the presence of Windpark Reufsenjoge III GmbH and Land Schleswig-Holstein (hereinafter, "PreussenElectra") [2001]ECR I-2099, para. 73. See also Trepte, P., *supra,* n. 172, p. 291.

[740] *Case C-513/99 Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne Judgment of the Court of Justice* (17 September 2002) (hereinafter, *"Concordia Bus Finland case"*).

[741] See *Commission's Green Paper, Government procurement in the EU: Exploring the Way Forward,* see also, Kunzlik, P., *Case Law Analysis,* PP. 193-194 available at: http://jel.oxfordjournals.org/cgi/reprint/15/2/175.pdf)

[742] See Commission of the European Communities, *Public Procurement in European Union, COM(l998) 143 final* (Brussels, 11.03. 1998), 27. See also Kunzlik, P., *Making the market work for the environment: Acceptance of some "green" contract award criteria in public procurement, (Case Law analyses): Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne (2002).* Para 34, Journal of

changed dramatically since the "landmark" decision of the European Court of Justice (ECJ) in the above-mentioned case which was delivered on 17th September, 2002. Indeed, even as the ECJ decision in that case was pending the EU Commission issued its *Interpretative Communication* in July 2001[743] to clarify the possibilities offered by the law to integrate environmental considerations into public procurement procedures. With the said Communication, environmental considerations were not only permissible but indeed encouraged as elements to determine the "economically most advantageous" tender.

Still in furtherance of its GPP policy the European Council, by the decision of 17 Dec 2007, laid down new regulations for implementing strict energy efficiency rules for government authorities. By this communication the EC adopted the US-based Energy Star programme. Under the new scheme, EU institutions and member state bodies are now expected to use energy saving criteria, based on its Energy Star programme, when buying office equipment. [744]

6.6.1.3 The New Public Procurement Directives

Shortly after the issuing of the Interpretative Communication, the so-called *New Public Procurement Directives* were passed in 2004. These are the *public contracts directive (2004/18/EC)*[745] and the *utilities contracts directive (2004/17/EC).*[746] These

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Environmental Law Vol. 15 No. 2, pp 175-201, available at http://jel.oxfordjournals.org/cgi/reprint/15/2/175 (accessed 13/02/09).

[743] See EC, *Commission interpretative communication of 4 July 2001 on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement* (COM(2002) 274 final), (hereinafter, "Interpretative Communication"), available at: http://www.sigmaweb.org/dataoecd/36/12/35026732.pdf

[744] Fiveash, K., *Brussels mandates Energy Star for green procurement, available at:* http://www.channelregister.co.uk/2007/12/18/green_regulations_benchmark_summit/ (14/01/08) See also http://www.computing.co.uk/computing/news/2206098/eu-mandates-energy-efficient and http://www.iisd.ca/mea-l/meabulletin39.pdf (last visited 30/12/09).

[745] *Directive 2004/18/EC supra n 361.* This Directive amends the *Council Directives 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts) and 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts.*

directives amended earlier directives that regulated various aspects of EU public procurement system. The Directives brought about significant changes in the whole public procurement system of the EU, including clarifying how the contracting entities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts.[747]

The two directives are generally comparable in terms of their provisions related to the environment.[748] They provide clearly that procuring authorities and entities are permitted, subject to specified conditions, to insert environmental considerations in the various stages of process, namely from defining the objectives of procurement, through specifying the goods and services to be procured.[749] Similarly, in specifying performance or functional requirements for service contracts, in designing the terms of supplier conditions of participation, and the award criteria, entities may include environmental characteristics or considerations.[750] However, transparency must be observed to ensure that the contract is awarded on clear terms.[751] As appropriate, procuring authorities are permitted too to use eco-labelling system [752] to define the quality and environmental characteristics of the goods. In relation to supplier qualification for environment-related jobs, the Directives permit procuring authorities

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[746] *Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.* This is an amendment to the *Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.*

[747] *Ibid*., Recital 12.

[748] Indeed they are almost identical even in the style used in the drafting. For instance both the directives stated in Recital No. 1, inter alia, that the directive was based on case law. Similarly in recital No. 6 each one of them referred to the integration principle of Art. 6 of the EC Constitution (See *supra*, n. 56). Again, they are similar in language and style for both the recitals and the substantive provisions.

[749] See Recital 42 to Directive 2004/17/EC

[750] *Ibid.* Art. 31(b).

[751] *Ibid.*. See also *Art. 38 of the Directive 2004/17*

[752] *Ibid.* Art. 34(6)

to demand the firms to show evidence or certification by an environmental management system designed or established by an international standardizing body.

Generally, the provisions of Art. VI of the GPA and those of the new Directives are comparable in prescribing that technical specifications shall be formulated "in terms of performance or functional requirements"[753] One clear difference between them is in the definition of technical specifications: while the Directives are explicit in including "environmental performance" as part of the elements of technical specifications[754] under the GPA, these are to be argued under the general exceptions (GPA Art. XXIII).

6.6.1.4 The Case Law

The Directives explicitly mentioned that the environmental provisions therein contained were informed by "case law". [755] Although the Directives themselves did not mention "climate change" in the reference to the environment, the case-law which founded the directives in that regard, made it explicit that the major consideration for the inclusion of environmental factors was in fact the EU's climate change commitments.[756]

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[753] Technical specifications Art. 43 (3)b:

[754] See Directive 20017/EC, Annex XXI on definition of certain technical specifications, thus: *"'Technical specification', in the case of service or supply contracts, means a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental performance levels,…"*

[755] See Directive 2004/17EC, Recital no. 1 which stated thus: *"[T]his Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting entities to meet the needs of the public concerned, including in the environmental and/or social area…"*. See also Directive 2004/18/EC, Recital 46, p. 10.

[756] See e.g. *Commission Communication on Limiting Global Climate Change to 2 degrees Celsius- The way ahead for 2020 and beyond*, COM(2007) 2 final, See also, generally, Kunzlik, *The Procurement of "Green" Energy,* in Arrowsmith, S. and Kunzlik, P. (eds,) Social and Environmental Policies in EC Procurement Law New Directives and New Directions (Cambridge, 2009).

The case law to which the Directives referred is *Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne.*[757] This case established the foundation for the possibility of incorporating environmental considerations into EU public procurement system. The case, in particular, delineated the criteria for determining economically most advantageous tender. This case also serves to show how inter-woven are technical specifications, supplier qualifications and contract award criteria. It concerns procurement by the city of Helsinki of bus transport services pursuant to the Directives 92/50[758] and 93/36.[759] The award criteria in the tender documents stipulated that the contract would be won by the company submitting the "economically most advantageous" tender. Three award criteria were specified, thus: (1) price, (2) quality of the bus fleet and (3) environmental certification of the bus company. Tenderers with the lowest price would receive a score of 86 points on the price factor and others proportionately less. Within a total maximum score of 100 points, an additional maximum 10 points would be given with respect to the quality of the bus fleet, those points to be awarded according to a certain formula related to nitrogen dioxide emission and noise of the buses offered. Finally, maximum 4 points would be given for quality and environment certification of the bus company. Six tenders were submitted, of which one (with alternative A and alternative B) from Concordia and one from a company owned by the city, HKL, which offered buses of a particularly environment-friendly type. In spite of Concordia's alternative B receiving maximum price points, HKL received a higher total score on the three award criteria and thus won the contract. Concordia submitted a complaint before a Finnish court, which referred some three questions

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[757] *Concordia Bus case, supra,* n. 739.

[758] *Council Directive 92/50/EEC Coordinating Procedures for the Award of Public Service Contracts* (18 June 1992) (Services Directive).

[759] *Council Directive 93/38/EEC Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors* (14th June 1993) (Utilities Directive).

to the ECJ for preliminary ruling. It is the answer to these questions that formed the basis of the decision of the ECJ.

In response, the ECJ held that a contracting agency could, subject to certain conditions, take into account such environmental criteria as the nitrogen dioxide emission of buses or their noise levels. The Court elaborated on the factors relevant to determining what constitutes the "economically most advantageous tender" holding that such factors need not necessarily be of a purely economic nature.[760] Thus, other factors which may influence the *value* of a tender could also be taken into account. The EU Services Directive (Art. 36 (1) (a) refers also to the "aesthetic and functional characteristics" of a tender. The Court interpreted the Services Directive to mean that, where in the context of a public contract for the provision of urban bus transport services the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it may take into consideration ecological criteria such as nitrogen oxide emissions or the noise level of the buses on condition that these criteria:

- have a direct connection with the subject-matter of the contract,
- do not confer on the contracting authority an unrestricted freedom of choice as regards the award of the contract,
- are expressly mentioned in the contract documents or the tender notice,
- comply with all the fundamental principles[761] of Community law, in particular the principle of non-discrimination.

The Court accepted that the particular environmental criteria at issue in the case satisfied all the above requirements. The criteria related to the level of nitrogen

[760] See *the Concordia Bus Finland* case. *Supra,* n. 739, para. 54.

[761] *Ibid.*, para. 69. These fundamental principles of the EC law are contained essentially in Arts. 14, 28 and 49 of the EC Treaty. They also form Art. 97 of the Euratom Treaty. These include (a) the principle of equal treatment which incorporates non-discrimination; (b) the principle of mutual recognition; (c) the principle of proportionality, as well as (d) the principle of transparency. See Directive 2004/17EC, Recitals 1 and 9, p. 2.

oxide emissions and noise levels of the buses to be used in providing the public transportation services for which the authority had invited tenders. As such they were to be regarded as linked to the subject matter of a contract for the provision of urban bus transport services.[762] Furthermore, the point system according to which the environmental criteria were to be applied did not confer unrestricted freedom of choice on the contracting authority since it required tenders to meet specific and objectively quantifiable environmental requirements.[763] Moreso, the criteria had, indeed, been expressly mentioned in the relevant tender notice.

Thus, under the EU system, the elements of a "most economically advantageous" tender could include climate change mitigation-related considerations insofar as the stated conditions are met. This reasoning was re-affirmed by ECJ in the *Evn AG's case*.[764] Accordingly, from the stage of initial decision by a contracting authority, on the subject-matter of the contract, to the drawing of technical specifications, the selection of tenderers and the defining of award criteria, the EU systems has given considerable policy space of including climate change and sustainability considerations for the authorities.[765]

Figure 3:

Figure 3 Leverages in EU procurement law for introducing environmental considerations: an overview

	Definition of the subject matter of the contract	**The environmental considerations and/or requirements should be indicated**
	Drawing up technical specifications	Product specification may relate to demands on type of materials/substances in the product (or service) The specification may relate to the environmental characteristics of process and production methods (PPMs) Product specification may refer to eco label criteria (of certified eco-label systems)

[762] Concordia case, para. 732.

[763] *Ibid.* para. 66.

[764] *Evn AG's case*, *supra,* n. 682. See also Van Calster, *European Case Law Report,* October 2003–March 2004 in RECIEL 13 (2) 2004 European Case Law Report, p. 4.

[765] See Kunzlik, *International Procurement Regimes, supra,* n. 170, p. 191.

		Purchasers are allowed to formulate specific environmental requirements (other than implied by 'standard' requirements of, for instance, eco-labels)
	Selection of tenderers	Environmental considerations may become relevant in the assessment of the 'technical capabilities" of candidates. This assessment cannot rely on an evaluation of a firm's management structure (i.e. environmental management schemes such as EMAS or ISO 14001 are not sufficient proof of high environmental performance of a product or service)
	Awarding a contract	The legislation distinguishes three award criteria: lowest price; most economically advantageous, and "additional award criteria". The discussion is on the scope of the applicability of the concept of "external costs" as an element of deciding on "most economically advantageous" and, in the context of additional criteria, on "secondary policy criteria" (e.g. social policy goals)
	Execution of the contract	The procurement directives do not cover the execution stage of a contract. The contract, however, may specify rules for the execution of the contract (e.g. recuperation of packaging material)

Source: After Barth and Fischer (2002)[766]

6.6.2 Examining the EU GPP system in the face of the GPA

Although the *Concordia Bus Finland* decision was applauded by environmental NGOs, as a "landmark"[767] this position of the EU law which permitted green procurement was heavily debated and criticized at Forum Europe conference in 2004.[768] Many questions, including those being considered by this research, were raised at the conference. These include questions of the extent of the compatibility green procurement with the WTO law.[769] As noted in Chapter 3,[770] the GPA obliges each Party to ensure that "its laws, regulations and administrative procedures, and the rules, procedures and practices applied by the entities, conform to the provisions of the GPA."[771] This obligation includes Parties' responsibility to notify the

[766] See Brander, L. and Olsthorn, X., *supra,* n. 494, p. 24

[767] See *Court ruling opens door to green and social procurement*, where the *Coalition for Green and Social Procurement* (EEB, WWF, Oxfam and others) reportedly welcomed the "landmark decision", (Published: Monday 16 August 2004 and Updated: Thursday 9 November 2006) at arctiv: http://www.euractiv.com/en/sustainability/court-ruling-opens-door-green-social-procurement/Art.-114707) (last accessed 12/08/08).

[768] See *Commission's green procurement plans heavily criticized*, *supra,* n. 603.

[769] *Ibid.*

[770] See Chapter 3, Section 3.4.1.1

[771] GPA Art. XXIV

Committee on Government Procurement (CGP) of any changes in the laws and regulations or how they are administered.[772]

In his recent work,[773] Trepte stated that as the EU participated actively in the architecture of the current GPA and that many of GPA's provisions were moulded in the fashion of the EU public procurement directives, there is the presumption that the EU law is (or should be) consistent with the GPA.[774] But this is not necessarily so. Indeed, Trepte's work mentions the potential of green energy procurement policy, which is permitted under the EU law and policy, to raise issues with the WTO principle of non-discrimination. This is in view of the fact that both green electricity and the fossil-based type are, as far as end-user is concerned, one and the same thing. In other words, while under the EU law, this differentiation based on PPMs not related to the physical characteristics is acceptable in so far as green energy procurement is concerned, this is not so under the WTO law. This position, as the jurisprudence[775] seems to show, has much to do with EU's constitutional obligation to use all avenues available at its disposal, in order to address climate change in accordance with its commitments under the climate regime.

Trepte's own view however, is in line with the WTO position, namely non-PR PPMs should not be a basis for preferential treatment for one over the other.[776] In his view,

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[772] *Ibid. The EU had form*ally approved the application of the GPA as well as all the Agreements reached in the Uruguay Round multilateral negotiations. *See Council Decision 94/800/EC: (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994),* Art. 2, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994D0800:EN:HTML

[773] See Trepte, P., *supra,* n. 172.

[774] *Ibid.*. Trepte referred to the parties' obligations under EC public procurement directives as "broadly similar" but not "identical" to those of the GPA. See 131 at n. 139.

[775] The jurisprudence referred to here is essentially those of the *PreussenElectra, Evn AG, and Concordia Bus Finland* decision, *supra,* n. 682 and 683 repectively.

[776] On this, See Malumfashi, G. I., *supra,* n. 11.

this seems to be the position even under the EU law. And this will mean the green energy procurement is not actually warranted by the EU Law and policy.

On the other hand, Kunzlik argues that PPMs both at production and consumption stages are acceptable as differentiating factors in green energy procurement under the EU law. For example, he believes that generally the non-discrimination principles of the EU law are comparable to the WTO's.[777] Hence, the environmental arguments based on GATT Art. XX (b) and (g) and the AB interpretation of these of this Article in the *US – Shrimp* decision could be applicable to permit PPMs based distinction under the EU procurement system.[778] Accordingly, he interpreted Art. GPA VI:1 which defines *technical specifications* of products to include also "the processes and methods for their production" as meaning both product-related and non-product related PPMs and at both production and consumption stage.[779]

From the fore-going, it can be discerned that there is a systemic difference between the GPA and the EU law on GPP. The difference hinges on the fundamental policy objectives that underline the two systems. That is to say while the GPA as a component of the WTO system is essentially about safe-guarding trade liberalisation in the context of GP, the EU system, on the other hand, has environmental protection at the heart of its common market policy and structure.

Thus, to the GPA and the whole WTO system, environment is not a core objective per-se; it is merely an incidental, or a complementary objective. This is seen in the fact that, as the EC puts it *in EC – Tariff Preferences*: "[T]he WTO Agreement is not

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[777] Kunzlik, P., *International Procurement Regimes, supra,* n. 170.

[778] See Recital 42 which says: *Contracting entities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics, such as a given production method, and/or specific environmental effects of product groups or services.*

[779] See Kunzlik, P., *International Procurement Regimes, supra,* n. 170, pp. 110-112.

an environmental agreement and ... it contains no positive regulation of environmental matters."[780] Thus environment-related issues are merely mentioned either in the preamble to the WTO Agreement, or in the general exceptions, and not as norms in themselves. On the other hand, under the EU, not only does the integration principle permeate all the EU policies, but the GPP is specifically an established policy tool by which the environmental, energy and climate change agenda are targeted. Accordingly, the law and policy of the EU places much weight on the GPP as a climate change tool. GPP thus is explicitly provided for in the EU statutes, and solidly backed up by the ECJ.

This therefore presupposes that while under the EU, henceforth, environmental considerations are not per se, a matter for a defendant to proof before the court; it is an issue of proof under the WTO law. In order words, a WTO party who faces a legal challenge for maintaining a climate-friendly procurement has the onus to prove it as falling under the GPA general exceptions. And as will be shown in chapter 7 of this work, it is always difficult to prove such exceptions because of the rule of "necessity" as well as "the *chapeau*" contained in the exceptions

In sum, while the WTO has always regarded non-trade concerns including the environment, with great caution, the EU, on the other hand, is proactive in its environmental and overall sustainable development policies. In particular, it is because the EU is conscious of its commitments under the climate regime that necessitate making the GPP as an integral aspect of it policy portfolio.[781]

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[780] See the AB, referring to EC's appellant's submission, (para. 54) in *EC – Tariff Preferences (ABR), supra,* n. 45, para. 96.

[781] See Malumfashi, G. I. *supra,* n. 11.

It is pertinent to observe that although there is no corresponding elaboration of the conditions under the GPA for the use of environmental considerations as found in the EU system, there are still synergies between the two systems. For instance, the elaborated conditions as found under the EU systems are targeted at ensuring non-discrimination, equal treatment and transparency which are also the hallmarks of the GPA and the WTO system as a whole. It is however still to be seen the extent of policy space provided under the WTO/GPA for Parties to include environmental/climate friendly considerations in the procurement decisions and processes. The WTO position is hinged on its reluctance to permit the use on NPR PPMs as basis of discrimination between products and services.

6.7 Summary

This chapter addressed the scope of GPP, and the likely legal issues that arise under the GPA. Trade effects in GPP are envisaged in the design of technical specification for products and services. The emphasis by the GPA on the use of international standards as yardstick for technical specification is arguably intended to reduce the trade effects arising from environmental PPMs. Thus the GPA gives more latitude to the Parties than what obtains in the TBT and SPS agreements, in that it requires that technical specifications must generally "be in terms of performance rather than design or descriptive characteristics."[782]

On the discriminatory or protectionist nature of GPP measure, the chapter explored the textual disparities between the GPA Art. III and GATT Arts. I and III on non-discrimination. Particularly, the omission of the term "like" in the GPP Art. III was seen as potentially a source of contention in event of litigation.

[782] GPA Art. VI:2(a)

The chapter also highlighted the controversy sorrounding the legality of the EU GPP system as it relates to the green energy procurement. Here, commentators including Trepte consider the PPMs issue as still an open matter. Others like Kunzlik look at PPMs issue in GPP as resolved. This is in view of the clear inclusion of PPMs in the definition of technical specifications in the New Directives. In general terms, however comparison between GPA and the EU GPP system revealed that the major difference between the GPA and the EU GPP systems hinges on the foundations of the two systems. That is to say, while the GPA is primarily a trade instrument and part of the overall WTO system, hence has environment only as complementary objective, the EU Common Market has environmental protection as part of its primary objective as provided in the the Integration Principle.[783] Accordingly, while under the EU, GPP is an established positive norm in the legal sources, under the GPA, a Party who maintains a GPP measure has the onus under the exception provisions, to prove that it is *necessary*, and also not discrimination.

[783] See Malumfashi, G. I., *supra,*, n. 11

CHAPTER 7

CLIMATE-FRIENDLY GP, THE APPLICATION OF THE ENVIRONMENTAL EXCEPTIONS AND THE BURDEN OF PROOF QUESTION

7.1 Introduction

It has been noted in Chapter One[784] that, generally, the GATT/WTO system recognises the sanctity of Members' sovereignty and the right to fashion domestic regulatory policies for securing certain "non-trade" concerns. These concerns are specified under the GATT Art. XX general exceptions (as reflected under GPA Art. XXIII). This chapter examines the extent of the said policy space for the GPA Parties to reflect the environment and sustainable development factors in their procurement processes. It seeks to specifically show how the WTO could be made more responsive to climate change mitigation demands. Ultimately, the chapter shows how through GPP the WTO system can contribute towards establishing coherence in the international legal instruments regulating trade and climate change. This is in line with objectives of the WTO system as outlined in the Preamble to the WTO Agreement which recognises that "trade and economic endeavour should be conducted … [also] in accordance with the objective of sustainable development, seeking both to protect and preserve the environment".[785]

Although there has been no complaints to the WTO dispute settlement body (DSB) against a climate-related procurement measure, this research, however, sees the potential for the occurrence of such disputes in the future. This is in view of the increasing awareness about climate change challenge on the one hand,[786] and the

[784] *Supra,* Chapter 1 Section 1.

[785] See Paragraph 1 of the Recital to the Preamble of the WTO Agreement.

[786] See, Esty, D., *Bridging the Trade-Environment Divide,* Journal of Economic Perspectives—Volume 15, Number 3—Summer 2001—pp. 113–130, at 115.

importance being attached to GPP as an effective tool for GHG emissions reduction.[787] The GATT jurisprudence is controversial on the issue of the extent of policy space provided by these exceptions, particularly as this relates to the environment. First, we observe some textual differences as between the GATT and the GPA provisions both on the non-discrimination norms and the environmental exceptions. Second, we see the difficulty associated with the meaning and/or proof of the *chapeau*, the introductory part of the exceptions: no environment-related measure in all the disputes ever, was able to be proved under the *chapeau* even most of the disputes had been accepted as covered under the exceptions.

The *Brazil – Tyres* ruling indeed had taken the jurisprudence from the known *US – Shrimp* ruling to some steps further, in clarifying the extent of the policy space provided under the GATT Art. XX. However, that dispute, not being climate-change related, and also not concerned with procurement, could not address some of the GPA-related textual and conceptual issues raised by this research. This chapter indicates however, that in an event of a GPP-related dispute between Parties to the GPA, the GATT jurisprudence would in general terms still inform the interpretation of the GPA.[788]

The question of allocation of burden of proof for claims or measures maintained under the GATT XX general exceptions (referred to as “affirmative defences”), is of particular interest to this research. It is normal in traditional international law to require a party to a dispute to prove an affirmative defence relied upon. This is also

[787] For instance, both Senators Barack Obama and John McCain in their campaign for the USA presidency for 2008 proposed GPP as part of their energy and climate change policy packages. They however did not advert attention to any potential conflicts between their proposals and the WTO rules. See for instance *Presidential Candidates' Key Proposals on Health Care and Climate Will Require WTO Modifications Overreach of WTO Highlighted by Potential Conflicts with Candidates' Non-Trade Proposals,* (Public Citizen's Global Trade Watch, Washington, DC, USA, February 2008), available at: http://www.citizen.org/documents/PresidentialWTOreport.pdf (accessed last: 07/10/08).

[788] These are the GPA versions of the GATT Arts. I, III and XX provisions respectively.

the position under the WTO. However, where the subject-matter of the defence is of special importance to the WTO Members, this rule seems to be problematic. Indeed, in *EC – Tariff Preferences* (dispute related to the application of the Enabling Clause), the rule was altered.[789] Thus, in the same spirit, in view of the significance to the WTO Members of climate change problems, the same approach adopted in the Enabling Clause case may be desirable. Indeed, this research is seeking an even safer and more conventional approach to achieve this. Climate-related measures are arguably accommodated under the GPA Art. XXIII. However, looking back at the GATT Art. XX(b) and (g) jurisprudence, such measures may not scale through the chapeau to that Article. This situation potentially will be constraining the efforts of the WTO Members to pursue that legitimate policy concern. Thus, re-examining this position, this research suggests that GPP be specifically insulated from the GPA Art. XXIII. Climate measures should instead be provided for as a separate positive norm. This would effectively reverse the application of the rule on the allocation of burden of proof, as explained later in this chapter.

This suggestion may raise concerns about possible abuse by GPA Parties hiding behind the proposed positive norm to perpetrate protectionism in the garb of climate change motivated GPP. The chapter suggests that limits could be imposed on the type of products or services that may qualify for the dispensation granted climate-related GPP measures. Thus, the current Doha negotiations on liberalization of environmental goods and services could provide an agreed definition for the goods and services to be designated as climate-related for the purpose of the proposed positive norm. The current review of the GPA could provide an opportunity to make the suggested changes in the text.

[789] See *infra,* section 7.5.1.2.

The chapter first, critically reviews the notion of the WTO single-undertaking vis-a-vis the relationship between the WTO Agreement and the Annexes, particularly, the relationship between the GATT Art. XX(b) and (g), and the GPA Art. XXIII. This is followed by a review of the WTO jurisprudence on the GATT Art. XX(b) and (g). Then the revised GPA 2007 provisions are considered, with a focus on the adequacy or otherwise of the newly inserted Art. X:6, which makes an explicit permission for inclusion of environmental considerations in procurement policies. The chapter concludes with suggestions for further improvement on the said Art. X:6 in line with the proposal for inserting positive norm which specifically permits climate-related procurement.

7.2 The GPA and the notion of "single undertaking" of the WTO system

In order to determine the applicability of the jurisprudence on the GATT Art. XX general environmental exceptions, to interpret measures brought under GPA Art. XXIII, it is pertinent to re-examine the constitutional relationship between the GATT and the GPA vis-à-vis the WTO notion of the "Single Undertaking". Single undertaking seems to have originated in Art. II:2 of the WTO Agreement which provides thus:

> The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements"[790]) are integral parts of this Agreement, binding on all Members.

This provision, according to the AB in *Brazil — Desiccated Coconut*,[791] requires all WTO Members to accept, as a "single undertaking," all the multilateral trade agreements which were attached in the 3 annexes to the WTO Agreement. Thus by

[790] These agreements are in Annexes "1" to "4". Annex 1A contains 13 agreements that regulate trade in goods, while Annex 1B is the GATS for services-related trade regulation, and Annex 1C contains the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). Annex 2 to the WTO Agreement is the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), while Annex 3 is the Trade Policy Review mechanism (TPRM).

[791] See *Brazil – Measures Affecting Desiccated Coconut*, Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, pp. 12–13.

single undertaking, as a negotiation technique, the whole Final Act should either be accepted or rejected.[792] The slogan between the Members during the Uruguay Round was "[N]othing is agreed until everything is agreed".[793] In other words, in order to enjoy any rights under one of the agreements, a Member must agree to be bound by the obligations stipulated in all the agreements. This technique, which had been adopted for the Doha Round too,[794] guides the relationship between various WTO agreements, and aims to achieve "greater consistency"[795] in their application by the Members.

The GPA, however, comes under Annex 4 which contains the plurilateral agreements[796] not included under Art. the single undertaking obligation of Article 2 of the WTO Agreement. GPA, going the WTO Agreement Art II:2 is thus an "exception" to the single undertaking scheme.[797] Similarly, as discussed earlier in Chapter 3,[798] that GP as an international trade mechanism is excluded from the non discrimination rules of the GATT (as well as the GATS).

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[792] See Levy, P. I., *Do we need an undertaker for the Single Undertaking? Considering the angles of variable geometry,* in Evenett, S and Hoekman, B. (eds.), Economic Development and Multilateral Trade Cooperation, (World Bank Publications, 2006), p. 417. This is admittedly an "exaggeration", because of the "plurilateral agreements" which bind "only certain members joined."

[793] *Doha Ministerial Declaration* adopted on 14 November 2001 (WT/MIN(01)/DEC/1), available at: http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#organization [last visited 29/05/10]. See para. 47: "With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of *a single undertaking*." [Emphasis added]

[794] *Ibid.*

[795] VanGrasstek, C. and Sauvé, P., *The consistency of WTO rules: can the single undertaking be squared with variable geometry?* Journal of International Economic Law 9(4) 837–864 [Advance Access publication 3 November 2006], at p. 480. Whether *Single Undertaking* actually helps to achieve the "greater consistency" or not is debatable. See generally, Wolfe, R., *The WTO single undertaking as negotiating technique and constitutive metaphor,* Journal of International Economic Law 12(4), 835–858.

[796] As pointed earlier, two out of the four plurilateral agreements have, however, been deleted from the annex as they had expired. See *supra,* Chapter 1 Section 1 and Chapter 3 Section 3.

[797] See Cottier T., *From Progressive Liberalization to Progressive Regulation in WTO Law,* Journal of International Economic Law, 2006 1(43) at pp. 7-8 and 14. The opposite technique to the "single undertaking" is "variable geometry" adopted under the Tokyo Round. Variable geomatry allows the GATT Contracting Parties, to select to become to complementary plurilateral codes as they wish.

[798] See *supra,*, Chapter 3 Section 3.3.2.1

On the other hand, according to the AB in the *US – Shrimp* ruling, the Preamble to the WTO Agreement (which recognizes "the protection of the environment" as one of the core objectives of the WTO) "informs *all the multilateral and plurilateral* agreements annexed to the WTO Agreement".[799] What then is the relationship between the GATT and the GPA? The answer to this question may help clarify the applicability of the jurisprudence of the GATT Art. XX to measures brought under GPA Art. XXIII. However, we also observe certain textual disparities between the provisions of GATT Art. XX and those of GPA XXIII.[800] The relevant provisions are set out below (with added emphasis):

The GATT XX*:*

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> […]
>
> (b) *necessary to protect human, animal or plant life or health*;
>
> [....]
>
> *(g) relating to the conservation of exhaustible natural resources* if such measures are made effective in conjunction with restrictions on domestic production or consumption.

The GPA Art. XXIII:2*:*

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures:

[799] *Ibid.*, para. 129. [Emphasis added].

[800] Textual disparities were also observed earlier in relation to the GATT Articles I and III and GPA Art. III on non-discrimination. See *supra,* Chapter 6 Section 6.5.

> *necessary* to protect public morals, order or safety, *human, animal or plant life or health* …

It is clear from the above that the GATT Art. XX provisions on the exceptions for environment-related measures are more extensive than those of GPA's Art. XXIII. Of course, the drafting styles, it can be seen from the texts, differ generally in the two instruments.[801] Specifically, the paragraph (g) of GATT XX (*relating to the conservation of exhaustible natural resources*[802]*)* is omitted in the GPA version. Details of the negotiating history of the GPA Art. XXIII, would have helped to clarify the motive of this omission (and that related to the "like" term under GPA Art. III discussed earlier in chapter 6[803]). Efforts were made, including contacts to the WTO Secretariat,[804] by the author, to obtain these details but up to the time this work was completed such information was not forth-coming. The author notes however the assertion by Thomas Cottier to the effect that because of the more liberal interpretation of the GATT Art. XX witnessed over time, "it is no longer required that the measure at stake directly benefit the conservation of natural resources."[805] The fact however remains that GATT Art. XX(g) is still the law.

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[801] The GPA version, generally, is a shorter version of the general exceptions incorporating both GATT Articles XX, and XXI (on "security" exceptions) [GPA version has 150 words while the GATT's is 534 words]. Specifically, while the GATT version has the introductory or head-note (referred to as "the chapeau") separate from the sub-paragraphs (a) to (j), the GPA's does not have sub-paragraphs and all is lumped in together with the chapeau. In effect, however the two versions address one and the same subject-matter: general exceptions to the substantive obligations. It can be observed also that the GPA version should cover "trade in services," too, but this is not made explicit. The same lacuna in the GATT's version is filled in by the GATS. We note that the main *Non-discrimination* rules in GPA Art. III explicitly includes also *services*. Thus it is logical that the (GPA) exceptions too, specify *services* too.

[802] The phrase "*exhaustible natural resources",* in the GATT Art. XX (g) has been interpreted by the AB in the *US - Shrimp* ruling using *evolutionary* approach, to include both living and non-living natural resources. There are however controversies as to whether the phrase was really intended to include the "living" natural resources like shrimp. See for instance Kelly, J. P., *supra,* n. 108. For our purpose however, the phrase is relevant regardless of the controversy, in so far as climate change problem affects both living and non-living resources.

[803] See Chapter 6, Section 6.6.1. See also Chapter 3, Section .3.4.1.1(c)(ii).

[804] See communications with some principal staff of the WTO Secretariat, Geneva, on this issue, attached as *Annex Appendix VI*.

[805] See Cottier, T., et al (eds.) *supra*, n. 546, p. 18.

The significance of this clarification could be seen where, in an event of a climate-related procurement dispute, the subject-matter is covered by the (g) paragraph. This argument is corollary to the wider question of the extent to which GATT Art. XX can be invoked as an exception to justify non-GATT violation (e.g. a violation of a norm under SCM Agrrement).[806] This clarification becomes necessary in view of the fact the exclusion of the GP is only in respect of the non-discrimination rules provided for in the GATT Articles I and III,[807] namely that, the exclusion does not include the application of the GATT Art. XX. Two possible answers suggested for the question of the extent of the application of the GATT Art. XX jurisprudence to a case procurement measures brought under GPA Art. XXIII:2, thus:

1) That the GATT Art. XX exceptions are applicable to procurement measures that contravene other provisions than the GATT Art. I and III, e.g., provisions of GATT Art. XI. In this case, therefore, the GATT (including the GATS as appropriate) would generally apply concurrently with the GPA to regulate procurement measures, at the least in areas not fully covered by the GPA.
2) If however, the exclusion means that government procurement is to be exclusively regulated by the GPA, which, in any event, has also provided for both *non-discrimination* (with its two pillars of NT and MFN) and the *prohibitions on quantitative restrictions* (all in GPA Art. III), as well as the general exceptions (GPA Art. XXIII), then the GATT Art. XX would not apply. In this case, however, the lacuna observed earlier in the GPA version of the general exceptions relating to environment would become relevant. The question then is what happens if a procurement measure at issue falls under the (g) part of the Art. XX omitted by GPA Art. XXIII?

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[806] On this, see Christopher, T., *Using GATT, Art XX to Justify Climate Change Measures in Claims Under the WTO Agreements,* Environmental and Planning Law Journal, Vol. 27, pp. 346, 2010, available at SSRN: http://ssrn.com/abstract=1676105; *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (Report of the Appellate Body, 2009).

[807] It has been noted earlier that the exclusion of government procurement in the GATS includes also commitments on market access. *supra,* Chapter 3, Section 3.2.1

As noted earlier, the *single - undertaking* notion requires all WTO Members to accept all the multilateral trade agreements attached in the 3 annexes to the WTO Agreement. However the WTO system includes also the Annex 4 to the Final Act which contains the plurilateral agreements, of which GPA is one. Thus the relationship between the GATT 1994 and all the other 13 agreements in Annex 1A[808] (and to some extent the Annexes 2 and 3 agreements too) looks clear: it is single undertaking.[809] Indeed, the AB in *Canada – Periodicals,*[810] declared concerning the relationship between the GATT 1994 and GATS thus:

> "We agree with the Panel's statement: '*The ordinary meaning of the texts of GATT 1994 and GATS as well as Art. II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and one does not override the other.*'"[811]

We see also, the *General Interpretative Note* attached to Annex 1A which provides that if there is "conflict" between the provisions of GATT 1994 and another Annex 1 Agreement the provisions of the latter prevails to the extent of the inconsistency.[812] This of course is in line with the spirit of the traditional international law principles of interpretation as enunciated by the VCLT.[813]

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[808] For instance, the AB held in *Argentina — Footwear (EC)*, affirming their earlier decision in *US — Gasoline*, that the provisions of Art. XIX of the GATT 1994 *and* those of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. Thus, "an appropriate reading of this 'inseparable package of rights and disciplines' must, accordingly, be one that gives meaning to *all* the relevant provisions of these two equally binding agreements." (Para. 81).

[809] For a concise exposition of the WTO jurisprudence on this, see Montaguti, E. and Lugard, M. , *The GATT 1994 and Other Annex 1 Agreements: Four Different Relationships?,* JIEL 2000 3(3):473-484. The authors identified through Panels and AB reports four types of relationships (namely, *conflict, express derogation, overlap and complementarity*) existing between provisions of the GATT 1994 and provisions of the other Annex 1 Agreements.

[810] See *Canada - Certain Measures Concerning Periodicals AB-1997-2* Report of the Appellate Body (WT/DS31/AB/R)

[811] *Ibid.*, p. 19 citing the *Canada - Periodicals* Panel Report, para. 5.17. For more insight on this the specific relationship between GATT 1994 and GATS, see *EC – Bananas III*, *supra,* 549, para. 221.

[812] See the *General Interpretative Note to Annex 1A, Multilateral Agreements on Trade in Goods, of the WTO Agreement, The Legal Texts: The Result of the URMTNs*, *supra,* n. 3.

[813] VCLT Arts. 31 and 32, *supra,* ns. 19-20.

There is no such clarity as to the relationship between the GATT/GATS on the one hand and, on the other hand, the Annex 4 agreements as it relates to the aspects not excluded, and as between the members of those agreements. In this regard, this research adopts the first answer, for two reasons: Firstly, the GPA Parties were first and foremost all Members of the WTO as the umbrella body. As such they are bound originally by the WTO agreement. Secondly, to the extent that the (g) part of the GATT Art. XX is essential to make the environmental exceptions more encompassing, it only makes sense that the GATT Art. XX is read alongside, and thereby making more complete the environmental aspects of, the GPA Art. XXIII. That is to say the GATT provisions and those of the GPA not covered by the GATT Art. III:8 exceptions, are binding as between GPA members on the basis of complementarity.

7.3 GPP and the application of the environmental exceptions

This section first looks at the parameters for the application of the general exceptions, and the attitude of the WTO adjudicatory bodies in this connection. The section then contextualizes GPP for climate change within those parameters. The current standing of the jurisprudence on this subject is represented, more or less by the rulings in the *US – Gasoline, US – Shrimp, US – Gambling* and *Brazil – Tyres* disputes.

7.3.1 The conventional jurisprudence on the environmental exceptions

7.3.1.1 The functions of the exceptions and the logic of their sequence

Going by the AB rulings in the above disputes, the function of the general exceptions under GATT Art. XX (and GATS Art XXIV), is to "affirm the right of Members to pursue objectives identified in the paragraphs of these provisions even if, in doing so, Members act inconsistently with obligations set out in other provisions of the respective agreements, provided that all of the conditions set out

therein are satisfied."[814] Thus the AB stated in its ruling in *US – Shrimp*, thus, "... We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. ...".[815] The determination of what constitutes such goal and the appropriate level of protection required to achieve the goal are sovereign decisions of the Members pursuing those goals. The WTO system recognises such decisions by Members as also aspects of their national sovereignty.[816]

However, in exercising this right using "unilateral"[817] types of measures, each WTO Member is required to safe-guard the non-discrimination obligations, and that its policies do not amount to affording "protection to domestic products"[818]. Thus, the AB emphasized the need to strike a proper balance between the affirmative commitments set out in, *e.g.*, Articles I, III and XI, and the policies and interests embodied in Article XX. This balance can be established by considering the entire framework of the GATT and "its object and purpose, on a case-to-case basis [as well as] by careful scrutiny of the factual and legal context in a given dispute, without disregarding the words actually used by the WTO Members themselves to express their intent and purpose."[819]

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[814] *US – Gasoline (ABR), p. 18; US – Gambling (ABR),* para. 291

[815] *US – Shrimp (ABR),* para. 185

[816] *Ibid.*. See also *United States-Measures affecting Alcoholic and Malt Beverages,* Panel Report, *DS23/R,* adopted 19 June 1992, BISD 39S/209, [hereinafter referred to as *'US - Malt Beverages'*]. The Panel cautioned that "determination [made] in the context of Article III ... [should] not unnecessarily infringe upon the regulatory authority and domestic policy options of contracting parties." Para. 5. 72.

[817] *Unilateral* measures, in contrast to multilateral ones, are those trade measures that individual countries take "unilaterally" and which may affect or even undermine the trade interests of other countries. The popular example of unilateral measures is found in the US - *Tuna/Dolphin* and *US - Shrimp* disputes. The actions of the US to conserve the dolphin and shrimp in those cases were considered as unilateralism. This is because the US actions were not agreed upon by all the parties concerned.

[818] GATT Art. III.

[819] *US – Gasoline (ABR),* p. 18.

With the above background in mind, it becomes now pertinent to examine briefly how the WTO adjudicatory bodies treat the environment-related disputes. Their approach has been to place the burden on the party maintaining the measure complained of, to prove that it was "necessary" for the attainment of the legitimate regulatory purpose intended.[820] The defendant should then proceed to show that, in line with introductory part of the Art. XX ("the chapeau"), the application of the measure was not arbitrary nor a means of an unjustifiable discrimination as between WTO Members, nor was it a disguised restriction on international trade. In other words, the defendant has to prove also that the measure does not amount to an abuse of the exceptions.[821] In order to examine the evidence and assertions of the parties to the dispute within the context of the exceptions the bodies then engage what has been referred to as the "process of weighing and balancing" of a series of factors. These factors mainly include 'the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.[822]

The above has been the conventional approach applied by the WTO judicial bodies in the rulings where GATT Art. XX exceptions are at issue. In *US – Gasoline*[823], the AB stated that for Art. XX to apply to justify a measure, such measure "must not only come under one or another of the particular exceptions… listed under Art. XX;

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[820] *US – Gasoline (ABR)*, pp. 22-23, DSR 1996:I, 3, at 21; *US – Wool Shirts and Blouses (ABR),* pp. 15-16, DSR 1997:I, 323, at 337; *US – FSC (Article 21.5 – EC) (ABR)*, para. 133; *US – Gambling (ABR),* paras 319-310.

[821] *US – Gasoline* (*ABR*), p. 21.

[822] See *Korea – Measures Affecting Imports Of Fresh, Chilled And Frozen Beef,* Panel Report, WT/DS161/R, WT/DS169/R, 31 July 2000, modified by Appellate Body Report, 11 December 2000, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5 [hereinafter, *Korea - Beef (ABR)*], para. 164. Aspects of the process of weighing and balancing have however been subject of controversy among commentators. See Regan, D. *The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing,* (2007) 6 *World Trade Review*, 3, 347–69. Regan believes for instance that the less-restrictive-alternative inquiry component of the "weighing and balancing" does not involve comparison between benefit and cost. It only compares "the costs of different measures that would achieve the benefit."

[823] *Ibid.*, p. 22

it must also satisfy the requirements imposed by the opening clauses of Art. XX."[824] The cumulative connotation of the provisions of GATT Art. XX (b) and (g) and those of GPA XXIII is to potentially exempt an environmental measure from other substantive WTO obligations if such a measure:

a) is "necessary to protect human, animal, or plant life and health', or is "related to the conservation of exhaustible natural resources,"[825] and
b) is not to be applied in an "arbitrary" or "unjustifiably discriminatory manner" or as a disguised restriction on trade.[826]

The essence of the sequence is logicality, in that if the purpose of the *chapeau*, as indicated by the AB in *US – Gasoline,* is "so as to prevent the abuse or misuse of the specific exemptions provided for in Art. XX",[827] then it follows that the measure at issue must first be properly investigated to see if it fits under the sub-paragraph the complainant places it. Thus, the AB in the *US – Shrimp* ruling out-rightly faulted the methodology adopted by the Panel that considered the *design of measure,* rather than *the manner of its application,* under the chapeau.[828] The Panel, on finding the measure as "discriminatory" closed its analysis and found that it was not justified under the Art. XX even without first identifying and examining the measure under the sub-paragraphs relied upon by the Defendant. The AB thus observed that this approach made the "task of interpreting the *chapeau* so as to prevent the abuse ... of the specific exemptions provided for in Article XX is rendered very difficult, if indeed ... possible at all."[829]

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[824] *Ibid.,* p. 20. See also *US – Shrimp US – Shrimp (ABR)*, para. 104 (approving this methodology as followed by the *US - Shrimp* Panel below. See Panel's report in para. 7.28.

[825] By virtue of XX(g), the measure must also be made effective "in conjunction with restrictions on domestic production or consumption".

[826] See Deal, T. E., *WTO Rules and Procedures and their Implication for the Kyoto Protocol* (USA Council for International Business, 2008), pp. 4-5, available at http://www.uscib.org/docs/wto_and_kyoto_2008.pdf

[827] *US – Gasoline (ABR),* p. 22.

[828] *US – Shrimp (ABR),* para. 120.

[829] *Ibid.*.

7.3.1.2 The crux of the US – Shrimp (AB) ruling

The AB in the *US – Shrimp*[830] did indicate that even though the GATT XX provisions were crafted in 1947, they have to be interpreted in accordance with the present day understanding of the principles and dictates of sustainable development. Thus adopting an "evolutionary" approach, the AB used the Preamble to the WTO Agreement to read "living natural resources" into Art. XX(g). Thus, the US *unilateral* and *process-based* measure adopted to ban the importation of turtle-unfriendly shrimp from the complainant countries was admitted as a *bona-fide* conservation measure well within the ambit of GATT Art. XX(g).[831]

However, when analysed against the chapeau, the US's measure was found wanting. By its express terms, the chapeau, as stated earlier is focused on "the application of a measure already found to be inconsistent with an obligation of the GATT 1994 but falling within one of the paragraphs of Article XX."[832] Thus US's measure was found to be applied contrary to the provisions of the chapeau for essentially two reasons. First, the application of the measure was *arbitrary* as no opportunity was made available to affected countries "for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries [e.g., in form of an appeal process]."[833] Secondly, the application also constituted an *unjustifiable discrimination between countries when the same conditions existed* because the affected countries were treated differently by the US

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[830] For summary of the facts of *US – Shrimp*, see *supra,* n. 104. For more analysis on this ruling, see *Trachtman. J. P., Decisions of the Appellate Body of the World Trade Organization Current Survey: United States--Import Prohibition of Certain Shrimp and Shrimp Products,* EJIL,Vol. 16 no .4 [2005], available at: http://207.57.19.226/journal/curdevs/sr47.html (last visited 4/07/10).

[831] *Ibid.* para. 142. Then in para. 141, the AB stated: *The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in United States - Gasoline between the EPA baseline establishment rules and the conservation of clean air in the United States.*

[832] *US – Gasoline (ABR)*, p. 22; *US – Gambling (ABR)*, para. 339 and *Brazil – Tyres (ABR)* , Para 215.

[833] *Ibid.*, para. 165

and for no justifiable reason. Indeed, in seeking to avoid unilateralism, the US law, [Section 609(a)] upon which the measure was based, required the US to engage in prior negotiations with countries that would potentially be affected by its application. The US did not effectively institute such negotiations. Where they did, it was found to be selective, not all-inclusive.[834]

In this sense, the AB inter alia, cited the Ministerial Decision establishing the CTE[835] which in turn made reference to the Principle 12 of the Rio Declaration, which called for the avoidance of unilateralism, and decided that the US should have taken serious steps to negotiate with all, not just some, of the Parties potentially to be affected by the measure, with a view to reaching a multilateral solution to the problem.[836] Thus, the shrimp importation ban was simply protectionist, as claimed by the plaintiffs, a form of eco-imperialism instituted by the US to favour its own industries under the garb of environmental protection. [837]

Therefore, the developments brought about by the *US – Shrimp* ruling in the WTO trade-environment jurisprudence could be seen in the following ways:

a) Loosening the "necessity" grip

One of the fundamental effects of the *US – Shrimp (AB)* ruling is that it shifted emphasis away from the "necessity" proof of an environment-related measure under the sub-paragraphs, to the chapeau conditionalities. In other words, it made

[834] The US did negotiate seriously over this issue with western hemisphere trading partners, and actually conclude with them a multilateral environmental agreement: the *Inter-American Convention for the Protection and Conservation of Sea Turtles,* opened for signature Dec. 1, 1996, *37 I.L.M. 1246.* However, the US refused to make similar efforts with the complainants in this dispute.

[835] See Chapter 2, Section 2.2.2.3

[836] *Ibid.*

[837] Thompson, B. H. (Jr.) and Coyle, J., *Trade Issues in Sustainable Tourism Certification: an Examination of the Constraints Imposed by International Trade Rules and Organizations (NAFTA, WTO, ECT), Barriers to Trade,* (Centre on Ecotourism and Sustainable Development, the International Ecotourism Society, Standford, 2005), p.4, available at: http://www.ecotourism.org/site/c.orLQKXPCLmF/b.4835379/k.55C1/TIES_Publications__The_International_Ecotourism_Society.htm (last accessed 21/07/10).

mockery of the *US – Shrimp (*Panel*)* ruling as much as it did the earlier *US – Tuna I and II* rulings which found the conservation of tuna and shrimps (respectively) as not covered by the exceptions in the sub-paragraphs. Thus, in the *US – Shrimp,* the AB here found it rather easy to admit the measure under environmental cover. Admittedly, even here, the AB's adventurism was criticised by a number of commentators as being without textual authority.[838]

b) The early shift in favour of PPMs

Related to earlier point made in respect of how necessity test has been watered down, is the PPMs issue. Going by the *US – Shrimp*, non-product related PPMs-based environment-related measures are in principle now admitted under the exceptions. Elementarily, the two categories are shrimps (those caught with TED and those with non-TEDS) here are ordinarily "like" products, but are made "unlike" only by their harvesting methods (PPMs). Differentiated treatment between them would be inconsistent with GATT Art. III:4, but permitted under XX(b). The *US – Shrimp,* however did not address the PPMs issue even as India, Pakistan and Thailand as Joint Appellees had brought this argument forward. US – Shrimp therefore followed the path of the earlier *US – Tuna/Dolphins I and II* rulings where the Panel ducked the PPMs issue by considering that GATT Art III essentially refers to measures affecting "product" not the "processes", and that trade-restrictions based on processes are covered by Art. XI.[839] Therefore, in both the *Tuna* and *Shrimp* disputes, as the matter was based on *process* (method of harvesting tuna/shrimp), the adjudicatory bodies' attention was adverted only to the Art XI.

c) Enthroning due process and negotiated approach to the chapeau

Rather than following the strict textualism as instituted by the VCLT, the AB introduced into GATT Art. XX what Charnovitz refers to as "a modicum of

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[838] See *supra*, chapter 2, section 2.2.2.1.

[839] See Conrad, C. R., *supra,* n. 28, p. 20.

procedural due process"[840] as means to fulfil the conditions of the chapeau. This includes good faith efforts to negotiate multilateral solutions, giving formal opportunity for the Complaining countries to be heard and an formal appeal process. However the *chapeau* language or the GATT does not provide for such negotiations or due process. Rather, these processes are found in the US legislation (Section 609(a)) and in the UNCED Report and the Agenda 21. This position however is problematic to this author as it seems to have been contradicted by the position in *US – Gambling.*

7.3.1.3 US – Gambling: contradicting or improving on the US – Shrimp?

US – Gambling was a services (GATS) related dispute. It is the first dispute in which protection of "public morals" exceptions under the GATS Art. XIV(a)[841] were examined. Thus the relevance of the ruling here is that it also generally addresses the application of the *general exceptions* and seems to up-date (until *Brazil – Tyres*) the jurisprudence related to the *necessity* and *chapeau* tests following from the *US – Shrimp* dispute.

In this dispute, Antigua complained against certain US federal and state laws that, according to Antigua, imposed a "total prohibition" on cross-border delivery of gambling services contrary to GATS Art. XVI on MFN obligations related to market access commitments.[842] The Panel found in favour of Antigua.[843] Further, the Panel

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[840] Charnovitz, S., *Belgian Family Allowances and the challenge of origin-based discrimination,* supra, n. 272, p. 25.

[841] The counterpart of this GATS Art. XIV(a) is GATT Art. XX(a). It provides for exceptions for GATS-inconsistent measures taken "necessary to protect public morals".

[842] For detailed analysis of this aspect of the ruling, see generally, Trachtman, J. P., *Decisions of the Appellate Body of the World Trade Organization, supra,* n. 829; Ortino, F., *Comment -United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services [Prepared for the ALI Project on the Case Law of the WTO],* World Trade Review (2008), 7: 1, 115–119; Irwin, D. A. and Weiler., J., *Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)*, World Trade Review (2008), 7: 1, 71–113.

[843] Panel Report, paras. 6.338 and 6.355. The Panel found inter alia that where there is a supply of services restriction through a particular "means of delivery", that restriction would effectively limit to zero the number of service suppliers and service operations. This would be contrary to Arts. XVI:2(a) and (c).

found that the defence of GATS Art. XIV(a) would not avail US as it could not demonstrate *necessity* of the measures taken. This conclusion was based on the fact that the US rejected Antigua's invitation to "engage in bilateral or multilateral consultations and/or negotiations" which would have facilitated the US "to pursue in good faith ... a reasonably available WTO-consistent alternative."[844]

The AB reversed the Panel's conclusion and accepted the Appellant's (US) view, inter alia, that there was no textual authority that required instituting such negotiations. However, the AB noted the Panel's finding that "... the United States has legitimate specific concerns with respect to money laundering, fraud, health and underage gambling that are specific to the remote supply of gambling and betting services, which suggests that the measures in question are "necessary" within the meaning of Article XIV(a)." Accordingly, the AB admitted the measures by US as *necessary* within the meaning of Art XXIV(a).[845]

Applying the chapeau test, the AB rejected the Panel's finding that inconclusive evidence of differential enforcement of the measures as between the domestic and foreign suppliers[846] was evidence of discrimination. The AB however, upheld the Panel's finding of discrimination where in applying a particular US legislation (Interstate Horseracing Act), *domestic* suppliers of remote betting services for horse racing were exempted from the prohibitions in the relevant pieces of legislation.[847] In other words, the US had failed to show that the prohibitions stipulated in the said legislation were applied to both foreign and domestic service suppliers[848]

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[844] *Ibid*., para. 6.531.

[845] *US – Gambling (ABR),* para. 325.

[846] Panel Report, para. 6.607.

[847] These legislation are: (i) Section 1084 of Title 18 of the United States Code (the "Wire Act"); (ii) Section 1952 of Title 18 of the United States Code (the "Travel Act"); and (iii) Section 1955 of Title 18 of the United States Code (the "Illegal Gambling Business Act", or "IGBA"). See *US – Gambling (ABR)*, para. 369.

[848] *Ibid*. t, para. 372.

Thus going by *US – Gambling,* the question of holding negotiation and/or observing due process in the application of the measures or as an effort towards finding available alternatives to the measures at issue, was rendered irrelevant a factor in the weighing and balancing process to establish necessity of a measure or its compliance with the chapeau. Thus, this aspect of the ruling which otherwise constitutes the crux of the *US – Shrimp,* raises the question whether *US – Gambling* strengthens or undermines the *US – Shrimp.*[849]

The above state of affairs made those commentators sympathetic to the "due process" and "negotiation" as a solution or pre-empt disputes, in particular Van Calster, wish the AB would take up the opportunity provided by *Brazil – Tyres* dispute to clarify on this and other grey areas in the trade-environment jurisprudence. "Disappointingly"[850] the AB did not.[851] This author is of the view that pre-complaint "negotiation" and the due process approach will have to be textualised to enable the AB to sustain it.

7.3.1.4 The effect of Brazil – Tyres on the conventional jurisprudence

Brazil – Tyres ruling represents the latest development in the WTO trade-environment jurisprudence, even as many issues are still unsolved. The ruling is seen by many commentators as initiating novel approach in interpreting the chapeau, which might reduce its constraining effect. Rather paradoxically, the ruling

[849] It can indeed be also recalled that the AB in *US – Gasoline* rejected a similar reasoning and reversed the Panel's finding to the effect that to the Defendant (Appellant) had omitted to "explore adequately means, including in particular cooperation with the [Complainant/Respondents'] governments", with a view to "mitigating the administrative problems relied on as justification" of the Defendant's measure. See *US – Gasoline (ABR),* n. p. 28.

[850] See Van Calster, G., *supra,* n. 38, p. 135.

[851] *Ibid.*. According to van Calster, the negotiated approach in this dispute:

> "would have meant in this instance, reviewing the regulatory process which had led Brazil to imposing the various targeted measures, including any efforts to discuss alternatives with the EU. Instead, the AB has left us with a 'truly Byzanthian' necessity test and a *chapeau* analysis much less focussed on due process and more on substance (but without clear indication how far Panels have to go in reviewing substance under the *chapeau*).

inter alia shows, as observed Pauwelyn,[852] that the chapeau must be complied with (i.e., avoiding "discrimination between countries where the same conditions exist"), even if, as a consequence, the Defendant: (1) would be more trade-restrictive, and (2) would favour the policy objective pursued. But *Brazil – Tyres* is even more interesting because, contrary to convention, it is now a developing country (Brazil) that instituted the environmental measure which a developed economy (EC) complained against.

Brazil imposed prohibitions[853] on the import of retreaded and used tyres. Retreaded tyres have shorter life-span than normal new tyres; hence their wastes rapidly accumulate, with adverse health and environmental consequences. Thus the stated objective of the Import Ban was the reduction of the "exposure to the risks to human, animal or plant life or health arising from the accumulation of waste tyres".[854] The level of protection set by Brazil was the reduction of the said risks "... to the maximum extent possible"[855] The ban, however, excluded MERCOSUR[856] countries following a MERCOSUR arbitral award.[857] Similarly, following an injunction obtained at a Brazil domestic court, "used tyres" that were banned alongside the retreaded tyres, were now allowed. The EC complained that the ban inter alia violated Brazil's obligations under GATT Arts. XI, I:1 and III:4. Brazil did not contest

[852] See Pauwelyn, S. *supra,* Chapter 2 Section 2.2.2.4, n. 137.

[853] Together with the associated measures including imposition of certain fines (hereinafter, "Import Ban")

[854] *Brazil – Tyres (ABR),* para. 170.

[855] *Ibid.*

[856] Mercosur (Spanish) or Mercosul (Portuguese), officially, the Common Market of the South, Latin American trade organization established in 1991 to increase economic cooperation among the member countries. Full members now include Argentina, Brazil, Paraguay, and Uruguay; Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela (which will become a full member once all four full members ratify its accession) are associate members.

[857] See *Brazil – Tyres (*Panel*)*, paras 2.13 – 2.16.

the illegality of its measures under the said provisions of the GATT, but cited as its defence, the GATT Art. XX(b), (g) and (d), as well as GATT Art. XXIV[858].

The Panel found the ban inconsistent with Article XI:1, but provisionally justified as "necessary to protect human, animal or plant life or health" within the meaning of Art. XX(b).[859] The Panel regarded the *discrimination* resulting from MERCOSUR exemption (effected to comply with a MERCOSUR binding Arbitral award against Brazil), as neither arbitrary nor unjustifiable. The Panel applied an *effects* test to reach at this conclusion, namely, that the quantity of import of retreaded tyres coming from MERCOSUR countries was insignificant as to affect the achievement of the Brazil's stated objectives behind the ban.[860]

The Panel however considered that the *discrimination* resulting from the exclusion of "used tyres" from the ban failed to meet the requirements of the *chapeau.* The Panel's decision here too was premised on the same effects test used in the case of MERCUSOR exemption, namely, that Brazil's imports of used tyres (now permitted) were so substantial that they "significantly undermined" the policy objective of the import ban on retreaded tyres. In other words, the Panel took into account not the fact that the court injunction was Brazil's internal matter (which should not be allowed to justify discrimination) but that the quantity of the used tyres was substantial enough to undermine the reasons for which the ban was imposed. On this basis alone, the Panel held that the import prohibition on retreaded tyres was applied by Brazil in a manner that constituted both "a means of unjustifiable

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[858] GATT Art. XXIV essentially permits derogation from the non-discrimination obligations for Custom union members. On the application of this Article see generally Report of the Appellate Body *Turkey – Restrictions on Imports of Textile and Clothing Products* WT/DS34/AB/R 22 October 1999. See also further analysis by Pauwelyn, J., *Legal Avenues to "Multilateralizing Regionalism": Beyond article XXIV,* [Paper presented at the Conference on Multilateralising Regionalism Sponsored and organized by WTO – HEI Co-organized by the Centre for Economic Policy Research (CEPR) (Geneva, Switzerland 10-12 September 2007)].

[859] *Brazil – Tyres (*Panel*)*, para. 7.215.

[860] See paras 7. 270 - 274

discrimination [between countries] where the same conditions prevail"[861] and "a disguised restriction on international trade"[862], within the meaning of the *chapeau* of Article XX of the GATT 1994. [863]

Another interesting aspect of this dispute is the winner (EC) appealed the Panel ruling requesting the AB to conduct proper analysis of the necessity of Brazil's measure against the environmental exceptions. The AB reversed certain aspects of the Panel's ruling, but still affirmed the conclusion of the Panel. Thus, the import ban: (1) was a violation of GATT XI,[864] (2) was "necessary" to protect health (and the environment) within the meaning of Article XX(b), but (3) failed to satisfy the requirements of the chapeau to Art. XX. Specifically, the AB faulted the Panel's reasoning based on quantitative analysis of the *effects* of the MERCOSUR exemption, and the used tyres exclusion. The AB considered that regardless of the actual effects of the MERCOSUR exemption and the used tyres exclusion, these are in, and of, themselves the reasons that made the measure an unwarranted discrimination between countries where the same conditions existed. The basis of this reasoning is that the MERCUSOR exemption and the permission for continued importation of used tyres run contrary to the objective of the ban, making it now to appear clearly that it was protectionist.

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[861] *Ibid.*., para. 7.310; see also para. 7.306.

[862] *Ibid.*, para. 7.349.

[863] *Ibid.*, paras. 7.357 and 8.1(a)(i) and (ii). The Panel exercised judicial economy with respect to the EC's claims that the exemption of MERCOSUR countries from the import ban and associated fines was inconsistent with Articles I:1 and XIII:1 of the GATT 1994. Same applied too with respect to Brazil's defence under Articles XX(d) and XXIV of the GATT 1994.

[864] As the ban violated GATT Art. XI, the Panel exercised judicial economy and did not examine the ban under Art. I. The AB however faulted this exercise of judicial economy since there was a substantive complaint which hinged on

7.3.1.5 Significant jurisprudential lessons learnt from Brazil - Tyres

Many commentators, among them Van Calster and Pauwelyn, as seen earlier in Chapter 2,[865] have highlighted the significance of this dispute in the development of the trade-environment jurisprudence following the *US – Shrimp*. Of particular interest to this research are the following points:

a) Confirms the shift from the Art. XX sub-paragraphs to the chapeau

Thus *Brazil – Tyres* has re-affirmed the shift of emphasis in the analysis of Art. XX disputes from the sub-paragraphs to the chapeau, an exercise that started with the *US – Shrimp* ruling. As Pauwelyn theorized, "Brazil essentially lost the case because it should have been MORE trade restrictive."[866] In other words, to show seriousness in its concern for the health and environmental hazards of the tyres (which was the central objective of the ban), Brazil should have extended the ban to include all countries in compliance with the conditions of the chapeau. Again, the court injunction, which necessitated Brazil to lift the aspect of the ban dealing with used tyres, was seen as counterproductive negating the integrity of the objective of the ban. These two scenarious worked against the justifiability of the ban under the chapeau. Thus, on the over all in effect, Brazil should have been more trade-restricting to achieve the level of the policy goal it set for the ban.[867] This leads some commentators to wonder if WTO is becoming an environmental watchdog after all. Hannes Schloemann, for instance, excitedly stated that the case was a

[865] See *supra*, Chapter 2 section 2.2.2.4.

[866] See Pauwelyn, J., IEL thread: *Brazil–Tyres: Breaking New Ground in Chapeau Interpretation*, *supra*, n. 137. [emphasis in the original] (See Panel's Report, paras 7.44 till 7.46).

[867] *Ibid.*. This line of reasoning is further confirmed by the AB's rejection of EC's proposed alternative and arguably less trade-restricting measures than "the total ban", which, according to EC, Brazil should have taken. The AB thus accepted the total ban would be the only measure that would reasonably be effective in addressing the problem of wastes accumulation resulting from the importation of re-traded tyres. See the AB report, paras. 156 – 175.

"slam dunk victory" for the environment.[868] Others however see *Brazil – Tyres* as essentially health-related case, as even the Defendant (Brazil) used "environment" "only as short-hand for human, animal or plant life and health.[869] On the other hand, the AB faulted the Panel's analysis of the chapeau which led to the conclusion that unjustifiable discrimination would be relevant only where it is "significantly" undermining the purpose of the measure. The AB held that unjustifiable discrimination need not be considered from its quantitative or qualitative effects.

b) Need for a balance between WTO Members' right and the chapeau

Brazil – Tyres arguable makes more glaring a looming contradiction between, on the one hand, the right of the WTO Members to determine the nature of their policies under the exceptions, regardless of the trade effects of those measures, and the restrictions on that right imposed by the chapeau conditionalities, on the other hand.[870] For instance, the AB's rejection of EC's proposed alternatives was based on the fact that these alternatives would not be adequate to serve the legitimate purpose pursued by Brazil with the ban: whereas what Brazil aimed at was to put "a preventive non-generation measure," [871] the alternatives proposed were waste management and disposal measures, hence "remedial in character."[872]

Thus a WTO Member is permitted to *subjectively* set its desired level of health and environmental protection measures, which other Members would be required to

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[868] See Schloemann H, *Brazil Tyres: Policy Space Confirmed under GATT Article XX,* (2008) 12(1) *Bridges Monthly*, http://www.ictsd.net/i/news/bridges/3141 viewed 10 August 2010 (last accessed 12/09/10).

[869] Joel P. Trachtman too does not see this case as demonstrating that "the WTO has 'truly become an environmental treaty.'" Rather the environmental aspect in the case "is best viewed as incidental." See contributions by Joel, Julia and Seema Sapra in the IEL Blog thread *supra,* n. 829.

[870] See also Ortino, F., *supra,* n. 829, pp. 117-119, (highlighting this complexity albeit from a different perspective).

[871] *Brazil – Tyres* (ABR), *para*. 56. Brazil sought to "reduce accumulation, transportation, and disposal risks associated with the generation of waste tyres in Brazil *to the maximum extent possible*." [emphasis in the original]

[872] *Ibid.*, para. 211

respect when suggesting alternatives. So this seems to show that the conditions for accepting a measure as necessary under Art. XX(b) has been relaxed in the face of possible alternatives proposed by the Complainant. The earlier position is that a measure is accepted as "necessary" "only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it,"[873] which the Defendant could "reasonably be expected to employ to achieve its health policy objectives."[874] This standard was set forth by GATT Panel in *United States – Section 337 of the Tariff Act of 1930*[875] and then affirmed by the AB in *Korea – Beef.*[876]

Brazil – Tyres seems to indicate that it is not the seriousness of the trade effects of the measure that is crucial; what is more relevant is the extent of the adequacy of the proposed alternative/s to achieve the desired level of the protection of health or the environment as set subjectively by that Defendant. Thus, the motivations for the measure in question are subjective, and regardless, could be necessary. However, examination of the measure under the chapeau is based on objective test. The chapeau on the other hand still comes to set strict constraints on this right of the WTO Members to the extent that no measure has ever been able to cross over the

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[873] *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes (Panel Report),* Adopted 20 February 1990, BISD 37S/200, para. 75.

[874] Korea – Beef (AB)

[875] *United States – Section 337 of the Tariff Act of,* Adopted 7 November 1989, BISD 36S/345*1930.* The Panel stated in para. 5.26 thus thus:

> It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.

[876] *Para.* 166.

constraints from the environment perspective.[877] *Brazil – Tyres* seems to have touched the issue but left it still un-solved.

c) *Brazil – Tyres,* developing countries and the trade-environment debate

A novel issue in the history of trade environment jurisprudence is the fact that the Complainant in the *Brazil - Tyres* dispute is a developed country and the Defendant developing country.[878] Indeed, developed countries are disposed to higher environmental standards as they possess the capacity to shoulder the high cost of environmental protection and management. Secondly, the relevant technology for environmental protection is more readily available and cheaper in the developed world than in developing countries. Thus, this effort by Brazil to institute health/environmental management measures is a welcome development even as Brazil still had to face litigation to prove that the new-found strength is not protectionist or discriminatory under Art. XX.

It is gratifying to note, however, that both the Panel and the AB were sensitive to the fact of real life difficulties and costs Brazil as other developing countries would face in handling their health and environmental issues. Thus, in rejecting the alternative measures suggested by the EC, the AB reiterated that the capacity of a country to institute measures that would be "particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives."[879] This is in a way an affirmation of what the AB expressly asserted in *US – Gambling.* There, the AB stated that a

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[877] At least, it is gratifying to note that a health measure has been able to cross the hurdle in *EC – Asbestos,* where the EC's restrictions on imports of asbestos were admitted both under the necessity and the chapeau.

[878] Thus, it was not surprising that, of the third parties, the developed and near-developed countries (U.S., Japan, S. Korea, and Chinese Taipei) sided with the EC, while developing countries (Argentina, Cuba, and Thailand) sided with Brazil. China only urged the Panel not to be oblivious of the fact that Brazil is a developing country, and the associated difficulties faced in dealing with environmental problems.

[879] *Brazil – Tyres (ABR)*, para. 171. See also *EC – Hormones (ABR)*, para. 187, where the AB, from a more general perspective, did underline the imperative of giving serious consideration to problems with "actual potential for adverse effects on human health in the real world where people live and work and die."

Respondent would not be rebutting the necessity case made by the Defendant if the alternative measure proposed is "purely theoretical" or it is such that the Respondent would be capable of taking "or where the measure imposes prohibitive costs or substantial technical difficulties.[880]

Thus Brazil's *total ban*, even though more trade restrictive, but so long it does not involve "prohibitive costs or substantial technical difficulties" and thus within the reach of a developing country like Brazil would be admissible as necessary under Art. XX.[881] Secondly, those alternatives would be inadequate in and of themselves alone as measures, to achieve the level of health and environmental protection that Brazil had set for itself.[882] This has important consequences for developing countries.[883]

Thus, if Brazil were a Party to GPA, and maintained a climate-friendly procurement measure against which a developed country GPA Party complains, Brazil's measure would most likely be readily justified as necessary. The main hurdle on Brazil then would be how to fulfil the *chapeau* conditionalities. On the other hand, however, and following from earlier analysis on the nature of the GPA as plurilateral agreement binding WTO Members who are signatories to it, [884] a developing country who is not a Party to the GPA would not be able to challenge a GPA measure against it. It can however challenge other environment-related measures not covered by the GPA.

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[880] See *US – Gambling Paras.* 308-9. See also Ortino, F., *supra,* n. 829, p. 119.

[881] *Supra,* See also the Panel's Report, paras 7.60-67; 7.80, and 7.208.

[882] *Ibid.*

[883] Harrison, J., *International Law –Significant Environmental Cases 2007- 08,* Journal of Environmental Law 20:3 [2008], 475 - 481, at 476 [Advance Access: 7 August 2008].

[884] Chapter 3 Section 3.3.2.1

7.3.2 Climate-friendly procurement as a legitimate policy objective

In order to qualify for justification under the general exceptions a measure has to qualify first as being maintained to pursue "a legitimate policy objective" as outlined under the sub-paragraphs. Thereafter a legal and factual and legal relationship has to be established between the measures and that policy objective.[885]

7.3.2.1 The significance of climate change and the GPA Art. XXIII

GPP, in pursuance of the climate change problem, no doubt, qualifies as a "legitimate policy objective" for the purpose of the GPA Art. XXIII. However, relevant GATT/WTO jurisprudence in this regard indicates that environment is taken as a whole, and the exceptions do not take cognisance of the differing nature and magnitude of environmental problems. Environmental issues that may give rise to trade-restricting policies differ, for instance, as to whether they are local, transboundary or global. These differences consequently differ also as to their impacts, and the appropriateness of the measure to be applied to address them. This differentiating character of environmental problems, were emphasized, among others, by Bhagwati, as considerations capable of influencing how a particular environmental phenomenon is to be addressed.[886]

As noted in Chapter 4,[887] many factors make climate change a particularly sensitive phenomenon which also requires urgent response. It is in view of this fact that this study considers if necessary that the trade rules give climate change a more special treatment commensurate to its sensitivity. Chapters 2 and 4 have pointed to a trend going towards this direction.[888] Indeed, climate-motivated GPP is not only a legitimate policy issue; it is also essentially backed by another multilateral

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[885] *US – Shrimp (ABR),* para 135.

[886] Bhagwati, *supra,* n. 73, p. 190.

[887] See Chapter 4. Section 4.2.2

[888] See Chapter 2, Section 2.1 and Chapter 4, Section 4.3.2.

agreement, the UNFCCC and indeed the KP. GPP may arguably be also justified in general terms pursuant to GATT Art. XX(d) which permits Members to maintain measures necessary to secure compliance with other laws which themselves are consistent with the WTO law. In this regards, even the Art. 3.2 of the DSU re-asserts that the WTO dispute settlement system aims to preserve the rights and obligations of the Members under the covered agreements, and to clarify those agreements "in accordance with customary rules of interpretation of public international law." It is to be noted here, however, that going by the AB ruling in *EC – Biotech,* WTO Parties' obligations under another sub-sector of international law (*in casu* the Biosafety Protocol[889]) would only be relevant as a justification for an otherwise GATT-inconsistent measure if all the Parties involved are signatories to that other rule or sub-sector of international law.[890]

This position is rather controversial as based on the interpretation by the AB of Art. 31(3) of the VCLT which requires that, to be relevant as basis for interpretation of WTO Agreement in relation to a disputed measure, that international rule must be "applicable in the relations between the parties."[891] It is even more controversial where the environmental policy in question which gives rise to the measure is climate change mitigation: a problem that affects every nation regardless of whether that nation is a signatory or ratifies the climate change treaty or not.

Even more controversial is the ruling in the *Mexico – Tax Measures on Soft Drinks*

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[889] The *Cartagena Protocol on Biosafety to the Convention on Biological Diversity 1992 Convention on Biological Diversity* signed in 2000, entered into force on 11 September 2003 (hereafter "the Biosafety Protocol").

[890] *EC – Biotech (*Panel*)*, para. 7.75.

[891] This position is subject of another study. See generally: Pauwelyn, J. *The role of public international law in the WTO: how far can we go?* AJIL Vol. 95 [2001]:535-587); Pauwelyn, J., *Unity and Fragmentation in International Law: Introductory Report on the World Trade Organization,* (Palma Workshop, 20-21 May 2005).

and other Beverages,[892] dispute. Here both the Panel and the AB decided that the reference to compliance with "other laws and regulations" under GATT Art. XX(d) was to the "rules that form part of the domestic legal system of a WTO Member and do not extend to the international obligations of another WTO Member."[893] Thus, rules of the UNFCCC or KP could only be invoked under GATT Art. XX(d) as justification for a climate-motivated procurement measure, if they are already domesticated by the Party invoking them.[894] This situation underlines the need to treat environmental issues that give rise to environmental measures on a case by case basis. This study submits that it is absurd to subject climate change issue to the interpretations and conclusions reached in the *Mexico – Soft Drink* and *EC – Biotech* decisions.

7.3.2.2 GPP and the "Necessity rule"

By virtue of the GPA Art. XXIII, to be justifiable climate-motivated GPP measure must be "necessary to protect human, animal, or plant life and health." And, if the GATT Art. XX(g) is read into it, then the measure, as appropriate, should be shown to "*relate"* to the conservation of exhaustible natural resources. Literally, the "necessity" requirement demands a closer level of relationship between the measure and the policy goal aimed at. The AB is supportive if this observation when it characterized the "relating to" requirement of paragraph (g) as being "more flexible textually than the "necessity" requirement found in Article XX(d)."[895]

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[892] *Mexico – Tax Measures on Soft Drinks and other Beverages*, WT/DS380/R 7 October 2005.

[893] *Ibid.*, paras 8.174 – 8.181; WT/DS380/AB/R. Para. 70. This position of the AB is regarded as "highly controversial" as it "completely ignore the status of international agreements in domestic law." See Cottier, T., et al, *supra,* n. 546, p. 19.

[894] WT/DS380/R 7 October 2005, paras 8.174 – 8.181; WT/DS380/AB/R

[895] See *Korea – Beef (ABR)* para. 161, footnote 104. Because of this *flexibility*, the AB accepted in *US – Gasoline* a measure because it presented a "substantial … or close and genuine relationship … of ends and means (between the measure and clean air conservation). Similarly in US – *Shrimp,* the AB accepted a measure for being "reasonably related" to the protection and conservation of sea turtles.

Since the GPA focused on the necessity test, it is logical that the research also focuses on the analysis to the meaning and effect of *necessity* in justifying a GPP measure. This approach avoids the seeming complications in the relationship between the GPA and the GATT in respect of the application of the exceptions, as highlighted in Section 2 of this Chapter. There, a point was made that based on the fact GATT Art. XX was not part of the government procurement curb-out under GATT Art III:8, GATT Art. XX (g) should apply alongside the GPA Art. XXIII.[896]

It is pertinent to recall, in any events, that the early high profile environment-related cases by which WTO including the 1996 *US – Gasoline* and 1998 *US - Shrimp* were all based on the Art. XX(g): *US – Gasoline* accepted "clean air" and *US – Shrimp*, interpreted "shrimps" all as falling within the meaning of "exhaustible natural resource" provided for under Art. XX (g). Consequently, if a measure to protect the air is justifiable under Art. XX(g), then logically, climate change mitigation measures such as GPP could be justifiable. What the GPP practitioner country needs to do at this stage is to establish a "substantial … or close and genuine relationship … of ends and means".[897] Indeed, Zhang opined that the capacity of the atmosphere to absorb GHG without adverse effect is an exhaustible natural resource within the meaning of GATT Art. XX(g).[898]

Now we turn back to the necessity test. It is to be noted that earlier jurisprudence on the test of *"necessity"* under Art. XX points to the fact that "necessity" of an otherwise GATT-inconsistent measure is to be considered from two perspectives: (1) whether the measures is particularly "indispensable" or "of absolute necessity" or

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[896] See Cottier, T., *supra,* n. 546 asserting in any event that Art. XX(g) is no longer effective.

[897] *US – Gasoline* (ABR), para.

[898] See Zhang, Z. .X., *The U.S. Proposed Carbon Tariffs, WTO Scrutiny and China's Responses,* International Economics and Economic Policy, 2009, p. 15, (available at www.eastwestcentre.org/fileadmin/stored/pdfs/econwp106/pdf (last accessed 07/07/10).

"inevitable" in addressing the national policy objectives sought,[899] and (2) whether it is necessary to apply the measure to the extent and level of the resulting inconsistency with the WTO rule.[900] In *EC - Asbestos,* after extensive reference to previous WTO jurisprudence,[901] the AB came to the conclusion that a measure could be considered "necessary" in terms of GATT Art. XX (b) only if there were no alternative measures consistent with the GATT, or less inconsistent with it, which a country could reasonably be expected to employ in order to achieve its health policy objectives.[902] This made some commentators to believe that "the necessity test in Article XX is too stringent." [903]

However, the recent understanding of the necessity requirement as seen in *US – Gambling* and more particularly *Brazil – Tyres*, indicates that necessity does not necessarily mean indispensability. In *Brazil - Tyres,* the EU contended that the mere fact that a measure is "trade restrictive" is enough to rule it out as "unnecessary". The Panel however disagreed with EU's perception, and emphasized thus:

> We do not exclude, however, that there may be circumstances in which a highly restrictive measure is *necessary*, if no other less trade-restrictive alternative is reasonably available to the Member concerned to achieve its objective…[904] [Emphasis added]

But then, as seen earlier, the available less trade-restrictive measure here should refer to a measure that the developing country is capable of taking as determined by its own level of health/environmental protection sought.

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[899] See *Korea –Beef ,* Panel Report, WT/DS161/R, WT/DS169/R, 31 July 2000, modified by Appellate Body Report, 11 December 2000, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5, para. 161. The AB however, considered that "necessity" in relation to Art. XX(d) (on measures maintained as necessary to secure compliance with another law which itself in on inconsistent with the GATT) could simply mean "making a contribution to".

[900] See *Brazil Tyres (ABR),* para. 7.209; See also AB in *US – Gambling (ABR),* para. 307.

[901] See GATT Art. XX (b) and the corresponding GATS a XIV (b).

[902] *Ibid.* para. 170–175.

[903] See Mattoo, A. and Subramanian, A., *supra,* n. 85, p. 20.

[904] *Ibid.* para. 7.211

Thus from the above, it is safe to suggest that GPP as primarily targeted at climate change mitigation, particularly, through reducing energy-related GHG emissions could be covered under both paragraphs (b) and (g) of GATT Art. XX. For this reason, and as also suggested by some commentators, including Howse[905] the GPA Art. XXIII:2 even without the GATT XX(g) aspect, would cover climate-motivated preferential government purchases. This is more so for climate-friendly products such as in renewables area, given the environmental harms and risks associated with conventional methods of generation.

7.3.3.3 GPP and the "Chapeau"

The *necessary* climate-motivated GPP measure has to also pass the *chapeau* conditionalities stipulated in the GPA Art. XXIII:2. As indicated earlier in this section, the *chapeau* addresses not the measure itself but the manner of its application.[906] Thus, the *chapeau*, according to AB in *US - Gasoline* seeks to prevent the "abuse of the exceptions".[907] Accordingly, the measure must be applied "reasonably, with due regard both to legal duties of the party claiming the exception and the legal right of the parties concerned."[908] The *chapeau* thus imposes higher degree of discipline, responsibility, and good faith[909], in the manner the measure is applied. The *chapeau*

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[905] See Howse, R., *Post-Hearing Submission to the International Trade Commission: World Trade Law and Renewable Energy: The Case of Non-Tariff Measures,* Renewable Energy and International Law Project (May 5, 2005), pp. 26-27.

[906] *US- Gasoline (ABR)*, p. 20. See also *United States - Imports of Certain Automotive Spring Assemblies*, Panel Report, BISD 30S/107, para. 56; adopted on 26 May 1983

[907] *US – Gasoline (ABR), Ibid.*. The AB stated here, thus:

> The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the *chapeau*, rests on the party invoking the exception. That is, of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.

See also *Brazil – Tyres (ABR),* Para. 224.

[908] *Ibid.*

[909] *US – Shrimp (ABR),* Para. 158.

requires that where a measure complained of is proved to be covered by any one of the policy objectives enunciated in paragraphs (a) to (j) of the GATT Art. XX, it must not have been maintained in a manner that will constitute *arbitrary or unjustifiable discrimination* or *a disguised restriction on international trade.* These phrases are ambiguous.[910] The fact these phrases were not defined in the legal texts made them even more controversial. The AB indeed acknowledged the difficulty associated with their interpretation. Thus a correct interpretation of the *chapeau* should allocate and mark out a "line of equilibrium between the rights of a Member to invoke an exception under Art. XX and the rights of the other Members under varying substantive provisions ... of the GATT 1994, so that neither of the competing rights will cancel out the other..."[911] Such an interpretation of the *chapeau* should ensure that the balance of "rights and obligations constructed by Members themselves" is not impaired or nullified.[912]

These chapeau terms, on the face of it, seem to imply one and the same thing, namely prohibition of an unjustified discrimination between all Members of the WTO in applying a measure which in itself is otherwise accommodated under the exception. Indeed, even the AB stated in *US – Gasoline,* that "arbitrary discrimination", "unjustifiable discrimination" and "disguised restriction" on international trade, may be read "side-by-side",[913] as the phrases "impart meaning to one another".[914] Their imports complement one another. And although some commentators opine that generally, there is lack of judicial guidance on the meaning

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[910] *Ibid.* p. 21.

[911] *Brazil - Tyres (ABR),* para. 224 (citing Cheng, B., General Principles of Law as Applied by International Courts and Tribunals, (Stevens and Sons, Ltd, 1953), p. 125.)

[912] *Ibid.*

[913] *Ibid.*, p. 23

[914] *Ibid.*

of the term 'disguised restriction on international trade",[915] the AB added that "disguised restriction" could include disguised discrimination in international trade.[916]

Thus what actually constitutes infringement of the chapeau is difficult to discern, and is determinable by the circumstances of each case. In all the environment-related disputes, the measures at issue passed the necessity tests, but failed the chapeau for different reasons. For instance, in *US –Tuna* and *US – Shrimp,* as the US failed to engage in good-faith efforts to resolve an environmental concern multilaterally, its unilateral imposition of domestic environmental policies through trade rules, or even provide opportunity for the affected countries to enquire into the appropriate of the application of the measure against them, was both "arbitrary" and "unjustified."[917] This ground however was rejected by the AB in the *US – Gasoline* ruling, as a reason, or additional reason upon which to found infringement of the chapeau in the application of the measure at issue. Similarly, in *US – Gambling*, and in the *Brazil – Tyres*, the chapeau was infringed because Brazil unjustifiably excluded MERCOSUR countries from the application of the measure, and also allowed other policies (import of used tyres) that would negate the object pursued by the measure at issue.

What the above scenarios seem to suggest is the uncertainty as to what the chapeau really means, or would require at each given time. This uncertainly results in the

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[915] Howse, R., WTO *Disciplines and Biofuels: Opportunities and Constraints in the Creation of a Global Marketplace* (IPC Discussion Paper October 2006), available at: www.agritrade.org (last accessed: 10/08/10). Howse lamented that '[T]here is lack of clear judicial guidance so far on the meaning of "disguised restriction on international trade. See generally *US – Gasoline* (ABR).

[916] *US – Gasoline (ABR),* p. 25.

[917] *US – Shrimp (ABR)*, para. 186. See more analysis on this in: Shaw, S. and Schwartz, R., *Trade and Environment in the WTO – State of Play*, Journal of World Trade, Vol. 36, no. 1, February 2002, 129-154, at pp 146-147. See also Thompson, B. H. (Jr.) and Coyle, J., *Trade Issues In Sustainable Tourism Certification: an Examination of the Constraints Imposed by International Trade Rules and Organizations' (NAFTA, WTO, ECT), Barriers to Trade,* 4 (Centre on Ecotourism and Sustainable Development, the International Ecotourism Society, Standford, 2005), available at: http://www.ecotourism.org/site/c.orLQKXPCLmF/b.4835379/k.55C1/TIES_Publications__The_International_Ecotourism_Society.htm (last accessed 21/07/10).

difficulty of countries to discharge the burden imposed by the chapeau. The result is it makes the litigation process tedious and time consuming and the result at times unsatisfactory even to a winning party. We recall how the winning Party in the *Brazil –Tyres* was also the appellant, asking the AB inter alia to re-assess the chapeau interpretation by the Panel. The AB did modify the Panel's ruling, even as it still found the chapeau conditionalities not fulfilled by the Brazil in some other ways.

7.4. GPP, the general exceptions and "burden of proof"

The question of the appropriateness of placing non-trade interests (including the environment) under the exceptions has also been regarded by critics in the section of the academia as additional hurdle limiting the domestic regulatory authority of the WTO Members. The placing of these interests necessarily meant that invoking them as "affirmative defences"[918] would require proof. In other words, it is trite law, and as seen in the preceding sections of this chapter, that a WTO Member defending, or responding, in defence of its otherwise GATT-inconsistent measure based on the GATT Art. XX, has the burden to prove the necessity of the measure as well as the chapeau conditionalities.

"Burden of proof," in the law of evidence, refers to the responsibility of a party to a dispute to persuade the court or tribunal of the veracity of the party's assertions or claims.[919] This responsibility is required of both the plaintiff/appellant and

[918] An "affirmative defence" in Criminal Law, under the Common Law (as opposed to "failure of proof"), is one in which the defendant, in a way, affirms the facts against him as stated by the claimant, and then asserts his defence as specified within the provisions of the applicable law. See Brody, D. C., Acker, J. R. and Logan, W. A., Criminal Law (First edition), (Aspen Publishers Inc., Maryland, United States, 2000). See also Simester, A. P. and Sullivan and G. R., Criminal Law – Theory and Doctrine, (Second edition, revised 2004) (Hart Publishing, Oxford, United Kingdom, 2003, pp. 537 – 543). Thus, invoking the GATT Art. XX exceptions, presupposes that the defendant has accepted the fact it has acted inconsistently with other GATT positive obligations in e.g., Article I or III or XI.

[919] Kazazi, M., *The Burden of Proof and Related Issues – A Study on Evidence Before International Tribunals* (The Hague, Kluwer Law, 1996) p.378.

defendant/respondent.[920] Its object is to identify the party whether complainant or defendant, that "must provide proof of a determinate issue at the risk of having the adjudicator rule against it with respect to that issue."[921] The traditional legal position of the concept of burden of proof as generally practiced by international tribunals[922] is partly encapsulated in the maxim *actori incumbit probation* which literally means "On the plaintiff rests the proving".[923] Following from this traditional position of international law the AB in the *US – Shirts and Blouses* ruling clearly stated that:

> [T]he sub-paragraphs in Article XX are "[…] *limited* exceptions from obligations under certain other provisions of GATT 1994, *not positive rules establishing obligations in themselves*. They are in the nature of *affirmative defences*. It is only reasonable that *the burden of establishing such a defence should rest on the party asserting it*."[924] [Emphasis added]

Thus, from the perspective of the general international law, the WTO law arrangement is normal. However, some commentators under the "trade and ..." discourses, seem to be critical though, only to the blind application of the rule, namely, without closer consideration of realities on the ground in the WTO Members circumstances. Howse, for instance, referred to this arrangement as a "GATT-specific" approach for the Party who invokes the *non-trade* exception to be required

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[920] See *Ibid.*, for discourses on the minor differences between the common law and civil law legal systems on the concept of burden of proof. Under Islamic Law of Evidence and Civil Procedure too, a 'the party that asserts a fact is responsible for providing proof thereof '. See generally, Arbouna, M. B., Islamic law of evidence - the function of official documents in evidence : a comparative study with common law, (Syarikat Nurulhas, Kuala Lumpur, Malaysia, 1999); Al-Andalusi, A. A. G., Tuhfah al-Hukkaam (Arabic, translated in Hausa language by Daura, U. M., pp. 1-2).

[921] *Ibid.*. Grando, T. M., p 1.

[922] See, generally, Pauwelyn, J., *Evidence, Proof and Persuasion in WTO Dispute Settlement: Who Bears the Burden?* 1 J. Int'l Econ. L, 1998 227- 258 citing at 232, the example of the practice at the ICJ, particularly the *Case Concerning Elettronica Sicula S.p.A. (ELSI) (USA v Italy),* International & Comparative Law Quarterly (1992), 41: 701-709.

[923] Anderson, W. C., A Dictionary of Law (1893), See the Law Dictionary (online) at the Lawyer Intl website at http://www.lawyerintl.com/law-dictionary/8200-actori%20incumbit%20probatio (accessed last 28/09/09).

[924] *US – Shirts and Blouses,* pp. 15-16.

to prove it before the dispute settlement body.[925] Hudec was quoted as saying in effect that "Article XX is an unfortunate design conceptually".[926] Indeed, Hudec advocated for the resurrection of the "Aims and Effects" approach[927] to interpretation of the general exceptions.[928]

"Aims and Effect" approach is an alternative or additional tool to explain the general exceptions. This approach affords WTO Members opportunity to distinguish valid exercise of their sovereign right to maintain well-intentioned domestic regulatory polices from those intended to undermine the objectives of trade liberalization. The approach applies where the measure at issue is *origin-neutral* in nature. In the practice of GPP, countries do not refer to the origin of the preferred (climate-friendly) product or service or the prospective bidders seeking to participate in procurement. It is usually in the implementation of the measure that foreign products and services or the bidders are found disproportionately affected by the measure. Thus, where the theory is applied it lightens the weight of the burden of proof required to prove an exception based on origin-neutral measure, as against the

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[925] See Howse, R, *From politics to technocracy—and back again: The fate of the multilateral trading regime*, presented at the symposium on: *The Boundaries of the WTO,* in Alvarez (ed), *supra*, n. 59, p. 110.

[926] See Julia Quin's contribution to an IEL blog discourse on implications of the *Brazil – Tyres (Panel)* at the IEL Blog, at: http://worldtradelaw.typepad.com/ielpblog/2007/06/braziltyres-bre.html (June 23, 2007), *supra*, n. 136.

[927] See Hudec, R., *supra*, n. 165, pp. 619-649, and Wille, S. B., *supra*, n. 165. "*Aims and effects*" in the literature is variously referred to as an "approach" or a "theory". These terms are used in this study inter-changeably.

[928] To support his view, Hudec referred to the position under the EU law provisions on exceptions to the rules on non-discrimination and quantitative restrictions through "indistinctly applicable" (meaning de-facto based) measures. Art. 30 of the *Treaty of Rome* prohibits discrimination based on quantitative restrictions, while Art. 36 provides for exceptions. Although the language in Art. 36 is based on GATT's Art. XX, Art. 36 has been interpreted more narrowly. Specifically, national environmental measures must: (1) not be arbitrary discrimination, (2) not have negative effects disproportionate to the objectives pursued, (3) be necessary to achieve environmental objectives, and (4) use the means that least restrict the free movement of goods. For a summary description of the somewhat uneven case law treatment of this distinction under the EU law, see Steiner, J., Woods, L., and Twgg-Flesner, C., EU Law, (5th ed. 2005), pp. 98-102. See also, generally, Charnovitz, S., *Environmental Harmonization and Trade Policy*, in Zaelke, D.,Orbuch, P. and Housman, R. F. (eds.), Trade and the environment: law, economics, and policy (Island Press Inc. Washington DC, US, 1994), 267-286; Ortino, F., Studies in International Trade Law - no. 1: Basic Legal Instruments for the Liberalisation of Trade A Comparative Analysis of EC and WTO Law, (Hart Publishing, 2004), pp. 147-142.

burden required in case of a measure which is textually discriminatory. Hence, the "aim" aspect looks at the stated policy objectives of the measure, while the "effect" considers the unintended discriminatory or protectionist consequences that result from the application of an otherwise origin-neutral measure.[929]

The theory was first considered by the Panel ruling in *US – Malt Beverages,*[930] and then in the *US – Autos*.[931] However, in a number of disputes including *Japan - Alcoholic Beverages*, the AB refused to adopt this approach because it would make GATT XX redundant in cases where the measure relates to one of the issue areas falling under those exceptions.[932] However, Hudec and many other commentators criticised the AB's position on aims and effects approach.[933] They believed the theory was still relevant and still alive.[934] Indeed, the theory was believed to have been implicitly applied by the AB in *EC – Asbestos*.[935] However, whether the theory is applied or not, this research sees wisdom in lightening the strictness applied in the scrutiny of GPP as an origin-neutral policy. Where the measure at issue concerns a scientifically recognised environmental challenge with global impact like climate change, an origin-neutral policy should be spared too close scrutiny.

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[929]Thus the test is "a broad description of a process, which evaluates multiple variables in determining cases. Factors that deal with intention fall under the 'aims' category and those that deal with results under the 'effects' category." See Wigneswaran, N., *The Myth of Equality 'Aims And E Effects' in International Trade Law And Human Rights Law,* Thesis Master of Arts in Law and Diplomacy Submitted by to the Fletcher School, Tufts University (2006) (unpublished) available at www.fletcher.tufts.edu/research/2006/Wigneswaran.pdf (accessed on 18/12/08), p. 30.

[930] *US - Malt Beverage, para.* 5.21. See also generally, Trachtman, J. P., International Economic Law Revolution and the Right to Regulate, (Cameron May (15 Dec 2005)].

[931] *US – Autos, supra,* n. 319.

[932] The second reason for the rejection of the aims and effects approach is that the texts of GATT Art. III:2 first sentence, specifically preferred the traditional text-based approach to the determination of "like products". Thus where the products in question are "like", then the regulatory purpose of the measure would not be relevant, and the measure would be invalid unless it could be justifiable under GATT Art. XX. See Hudec, *supra,*, n. 165, p. 15

[933] Qin, J. Y., *Defining Nondiscrimination Under the Law of the World Trade Organization*, Boston University International Law Journal, Vol. 23 [2005], pp. 214- 297, at 245.

[934] See generally, Trachtman, J. P., and Porges, A., *Robert Hudec and Domestic Regulation: The Resurrection of "Aim and Effects"*, 37 Journal of World Trade 4 (2003), 783-799. Esty too argued not for the theory as such but for the import and purpose of the theory. See Esty, D. C., *supra*, n. 70, pp. 116-117.

7.5 Any solutions for climate-motivated procurement?

This uncertainty and difficulty generally associated with the GATT XX jurisprudence (and the chapeau in particular) was recognised once by the AB,[936] as well as various commentators including Cottier[937] and Howse,[938] among others. What this means is that to the extent that climate change is included, as it is currently, within the myriad of environmental concerns, then any climate-friendly measure maintained will have to face the chapeau conditionalities as well. The reason is that Art. XX is a "general exceptions" provision. As highlighted earlier an exception invoked has to be proved.

7.5.1 GPA amendment proposal

7.5.1.1 Provide for GPP as a positive norm

It could be recalled that, earlier on, the critique labelled by environmentalist was targeted at the appropriateness of the WTO system to handle environmental concerns. This critique was instigated by the *US – Tuna* rulings. One of the popularly suggested solutions then, was to remove environmental issues from the WTO and assign them to a proposed GEO (Global Environmental Organisation).[939] When the *US – Shrimp* tactfully *saved* the situation, the attention of the environmentalists and the academia now re-directed not on the WTO system as a whole, but to viability of the GATT Art. XX as a whole, namely both the *necessity*

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[935] *Ibid*., p. 784.

[936] *US – Gasoline (ABR),* p. 22. The AB stated thus:

> The burden of demonstrating that a measure provisionally justified as being within one of the exceptions set out in the individual paragraphs of Article XX does not, in its application, constitute abuse of such exception under the chapeau, rests on the party invoking the exception. That is, of necessity, *a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue*. [emphasis added]

[937] See generally Cottier et al, *supra,* n. 546.

[938] See Howse, R., *supra,* n. 914.

[939] See chapter 2, section 2.2.2.1; Esty, D., *supra,* n. 70

and the *chapeau* tests. From what has been seen in this thesis, the problem has shifted from the *necessity* to the *chapeau* even as the two are inter-connected.[940]

The question now is what next do we expect in this logic and progression? It is clear that creation of a GEO or even a radical review of the current general (environmental) exceptions to alter the strictness of its requirements or proof thereof, is rather a long shot. On the other hand, the immediate problem being addressed by this thesis is what contribution government procurement tool could be made to climate change mitigation efforts.

This thesis first posits that this jurisprudential uncertainly may undermine the urgency needed to address the climate change. Thus while the controversy in search of the parameters for the application of the GATT Art. XX continues this thesis sees a way out in the area of climate-friendly procurement, namely:

- to multilaterally agree on the definition of the climate-friendly goods and services in the context of Doha or outside it,
- amend the GPA and provide for a positive norm that permits procurement measures that would relate to the specified CGS. A "permissive norm", according to Pauwelyn is the aspect of international law norms that "grant a *right* to states to do *something*". [941]

This explicitness, it could be recalled, is the approach of the EU law and policy for green procurement. For WTO, multiple benefits could be achieved with this approach. It is a middle course between the two extreme positions: the position of

[940] The inter-connection can be seen where, in an effort to determine necessity of the measure at issue, the adjudicatory bodies embark on the "weighing and balancing" of various factors, including the available alternatives. But that alternative has to be negotiation on a bilateral or multilateral level between the defendant and the countries potentially affected. This negotiation will trigger chapeau case: how even was the involvement of the various countries concerned. (*US – Shrimp, US – Gambling*),

[941] See Pauwelyn, J., *supra,* n. 21, pp. 159-161. [Emphasis in the original]

the unlikely creation of a GEO or the radical review of the environmental exceptions on the one hand, and on the other hand, the perpetuation of the status-quo.

1) This approach will accord climate change challenge its significance, while allowing for the existing provisions on the exceptions to address other environmental problems of merely domestic or trans-boundary nature. This thus allows for a proportionate response given to climate change. This therefore responds to the suggestion by many commentators, including Esty and Bhagwati, that the magnitude of the environmental problem at stake should be taken into account in deciding on regulating measures taken pursuant thereof.
2) The positive norm will ease out or circumvent the textual disparities and inconsistencies existing as between the GATT Art. XX and GPA Art. XXIII which could potentially breed controversies in an event of a complaint against climate-related procurement measure.[942]
3) The approach will effectively also circumvent the technicalities and uncertainties associated with the interpretation of the necessity and chapeau tests. In a way, this approach also serves the controversial question of the need to hold "negotiations" with countries that may be affected by an impending measures, with a view to reaching a multilateral (or bilateral) solution.
4) Strategically, and most importantly, this proposal will effectively shift the burden of proof from the party maintaining the measure to the party complaining against the measures. In other words, the party maintaining the climate-friendly procurement measure would be doing so *not* under an exception, but as permission under the new positive norm as proposed. This positive provision will be backed by the CGS list attached to the Agreement.

[942] See *supra*,, section 7.2

> In other words, so long as the defendant's contracting relates to any item found in the CGS list, then, the burden of proof shifts to the complainant who will need to show why the measure should not be taken. He should show discrimination or protectionist motive or behaviour behind the measure. The defendant would then respond in the conventional manner.

Thus this proposal may be seen also as a reward for climate-conscious GPA Parties for taking hard measures to deliver global public good. It therefore assures the GPA Parties of their domestic regulatory authority to freely convert their huge procurement power into an opportunity to pursue other policy ends. All that a Party needs to do, in maintaining a climate change related measure, is establish clear nexus between the measure taken and climate change ends.

One issue that immediately comes to mind in considering the above proposal is the safe-guard against abuse of the provision that made climate-friendly procurement a positive rule. This can be addressed by inserting relevant complementing conditions to be observed by any GPA Party engaged in climate-friendly procurement under that provision. The conditions may include whatever agreement or understanding that may be negotiated in relation to the definition and the supply of climate-friendly good and services (CGS) (as a sub-category of EGS), as well as definition of climate change projects (as suggested by Cottier[943]), at the Doha. Whatever decision or arrangement reached in this regard at the Doha could be used as a reference point for climate-friendly procurement measures under the proposed new provision in the GPA.

This suggestion is not entirely new, or radical, to the WTO law and jurisprudence. Similar approach, in effect, was adopted in two situations: First, it can be likened to

[943] See *supra*,, n. 579

the happening in the *EC – Tariff Preferences* case.[944] There the AB accepted that although the Enabling Clause[945] was an "exception" to GATT Art. I, however, for the purposes of allocation of burden of proof, it was regarded as a special kind of exception and should, and did indeed receive a treatment different from and more favourable than, other exceptions of the GATT Art. XX nature. Secondly, it is likened to the approach adopted in the TBT and SPS Agreements where non-trade legitimate policy concerns including those in the GATT Art. XX exceptions are provided for in the main positive provisions. Though this is a subject of a more in-depth study, suffice it to mention here that these two agreements permitted technical regulations including on these concerns so long as they are based on international standards and or backed risk assessment and sound scientific evidence.[946] Below is an elaboration of the *"EC – Tariff Preferences* example.

7.5.1.2 Burden of proof in the light of "EC – Tariff Preferences" ruling

One of the main issues of contention in this dispute was whether the Enabling Clause,[947] was an exception to GATT Art.I:1 on MFN obligation, or a positive norm establishing obligations, for the purpose of allocating the burden of proof. India, the Complainant, contented that the Enabling Clause was an exception. India, accordingly, asserted that the EC (Dependant) which maintained Generalised

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[944] *EC – Tariff Preferences (ABR) supra,* n. 45.

[945] The *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of the Developing Countries,* GATT Document, L/4903, BISD 26S/203.

[946] See *supra,* chapter 6, section 6.2. See elaborate treatment of the TBT and SPS approaches by Matto and Subrimanian, *supra,* . 88.

[947] *Ibid.*. The *Enabling Clause* constitutes one of the "other decisions of the CONTRACTING PARTIES" provided for by paragraph 1(b)(iv) of Annex 1A incorporating the GATT 1994 into the *WTO Agreement.*, That provision states that:

> 1. The General Agreement on Tariffs and Trade 1994 ("GATT 1994") shall consist of:
>
> ...
>
> (b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:
>
> ...
>
> (iv) other decisions of the CONTRACTING PARTIES to GATT 1947[.]

System of Preferences for Developing Countries (GSP) programme pursuant to the Enabling Clause must comply with its MFN obligation under the said GATT Art.I:1. India further maintained that the EC could not rely on the Enabling Clause to act inconsistently with the said obligation, by discriminating between the developing countries that were the beneficiaries to the EC's GSP programme. The EC supported, inter alia, by the US, counter argued that Enabling Clause was, in itself, a "positive rule establishing obligations",[948] just like the GATT Art. I:1. The Panel found in favour of India, namely, that the Enabling Clause constituted an exception to the GATT Art. I:1, and that a party relying on it must act consistently with the conditions stipulated therein.[949]

On appeal, the AB first accepted that Enabling Clause, by its content, context and history, served as an *exception* to the MFN rule established by GATT Art.I:1.[950] The AB, however, cautioned that the Enabling Clause was an exception of a special nature, '*not a typical "exception", or "defence", in the style of Article XX of the GATT 1994,* or of other exception provisions identified by the Appellate Body in previous cases.'[951] Thus, it should be treated differently from the manner Art. XX exceptions have traditionally been treated.[952] In other words, going by its history the Enabling Clause was consciously accepted as permitting, indeed "encouraging"[953] the contravention by the contracting parties of their MFN obligations under GATT

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[948] *EC – Tariff Preferences (ABR)*, para. 74.

[949] See *EC – Tariff Preferences (*Panel*)* WT/DS246/R, 1 December 2003, para. 8.1(c)

[950] AB re-asserted that mere use of the phrase "Notwithstanding the provisions of GATT Art. I:1…" in para. 1 of the Enabling Clause points to the fact that it was an exception to that Art. Paragraph 1 of the Enabling Clause, which applies to all measures authorized by that Clause, provides as follows:

> Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.

[951] *EC-Tariff Preferences* (ABR), paras. 106-107 [Emphasis added]

[952] *Ibid.*, para. 108. The AB stated regarded "the particular circumstances of this case as dictating a special approach, given the fundamental role of the Enabling Clause in the WTO system as well as its contents."

[953] *Ibid.*, para. 111.

Art 1:1.[954] This arrangement was allowed in order to serve the special purpose for which it was negotiated,[955] namely, to allow for special and differential and more favourable treatment for developing countries. The Enabling Clause was thus aimed at stimulating the growth and economic development of the developing countries within the overall objectives of the GATT/WTO system.[956]

Accordingly, the AB held that India as the complainant would have to establish clearly its complaint under the Enabling Clause and not under the GATT Art. I:1. This would mean the fact that the EC did not observe MFN obligation under the GATT Art. I:1 would not form a basis of India's complaint as the Enabling Clause operates "notwithstanding" the GATT Art. I:1. In the same way, the AB maintained, that the EC relying on the Enabling Clause would still shoulder the responsibility of establishing that the GSP scheme it was engaged in satisfies the conditions of the Clause.[957] In this way, the conditions parallel to those of the Enabling Clause would include, as stated earlier, the list of the CGS with which the Dependant's procurement should be shown to relate.

Parallels can be drawn between the position of the Enabling Clause and that of climate change. The Enabling Clause addresses a special issue which is also an appendage to the core principles and values of the WTO, namely, enabling the economic development,[958] especially of the developing countries, through the encouragement of the developed countries to engage in the GSP schemes. GSP schemes offer developing countries trade preferences and concessions without also

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[954] *EC-Tariff Preferences* (Panel), para. 9.9.

[955] *Ibid*., para. 110

[956] *Ibid.*

[957] *Ibid.*, para. 105

[958] *Ibid.* Para 108, citing the Ministerial Decision of 14 November 2001, *Implementation-related Issues and Concerns*, WT/MIN(01)/17, paras. 12.1-12.2.

asking for reciprocations from them.[959] Thus the Enabling Clause arrangements were accepted even as they would naturally result in contravening the core GATT/WTO principle of MFN. In the same spirit too, climate-friendly procurement policies which are aimed at addressing global concerns (developing countries inclusive), are entitled to similar treatment under the trade rules.

The AB underscored the significance of the Enabling Clause also in the light of the Doha Development Agenda (DDA), noting that the trade and development relationship between and "in particular the role of the Enabling Clause, remain prominent on the agenda of the WTO, as recognized by the Doha Ministerial Conference in 2001." Climate change, on the other hand is equally important in the light of the DDA, especially as relates to the agenda on the liberalisation of environmental goods and services as highlighted in chapter 5 of this study.[960]

This study notes the AB's opinion in *EC – Tariff Preferences* that placing an issue under the exception does not necessarily diminish its importance.[961] And indeed, this is more so in view of the fact that "the environment", the umbrella subject of this study, is already included as one of the preambular objectives of the WTO system. However, moving an issue from being an exception and making it the rule, or from the preamble[962], to the main text of the treaty, will definitely elevate its significance.[963] Therefore, even though the Enabling Clause still remains in its status as an *exception* and has not been re-coached into a positive norm, the *EC* –

[959] *Ibid.,* para. 111.

[960] See *supra,* Chapter 5, Section 5.2.2.3(b).

[961] *EC-Tariff Preferences* (ABR), para. 95.

[962] Of course, "Preamble" (as well as annexes) according to the VCLT is included, for the purpose of treaty interpretation. See VCLT Art. 31(2). See Jacobs, F. G., *supra,* n. 107.

[963] See generally *supra,* chapter 2, section 2.2.2.1. Bhagwati likened the items stated in a preamble as "the overture at the opera: the audience is free to rustle through the libretto and even to whisper to friends until the real opera begins!" See Bhagwati, *Afterword: The Question of Linkage, supra,* n. 60, footnote 27.

Tariff Preference ruling has placed the status of Enabling Clause close to that of a positive norm. The ruling for instance maintained that where a complaint is to be brought based on an Enabling Clause -related measure, the complainant should essentially establish his case against the provisions of the Enabling Clause, not the GATT Art. I:1. Thereafter, the defendant is required to discharge its burden of proving that the measure if fact has been authorised by the Clause, and that the conditions in the clause have been satisfied by the measure.

Meanwhile, the provision of Art. XXIII will remain in the GPA to work as the normal general exceptions, and could cater for other environment related measures which fall outside of the specific CGS now provided in the annex. With this, the GPA regime would be used as an active supporter and enabler of measures which are aimed at "non-trade" ends, and in this case, the climate change. The revised version of the GPA 2007 which is currently not in force could provide an appropriate and timely opportunity to effect these proposals. And indeed, it could be recalled that even the Tuna/Dolphin Panel suggested it was for the Contracting Parties to negotiate whatever change they deem necessary. Thus, the Doha Round negotiating agenda for liberalisation of environmental goods and services is an added opportunity for this.

7.6 Revision of the GPA and the environment-related provisions

7.6.1 The Committee on Government Procurement revisions: overview

The Committee on Government Procurement (CGP) was established pursuant to Art. XXI of the GPA. It administers the GPA, oversees its implementation. Its membership is composed of representatives from each of the Parties. It is the Committee's responsibility, pursuant to GPA Art. XXIV:7(c) to periodically organise the GPA Parties to "undertake further negotiations, with a view to improving this

Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity." It is in accordance with this "built-in commitment to negotiations"[964] that negotiations were launched in 2004 to review the GPA. The agreement was revised and by December 2006, a revised version (Revised GPA 2007) was produced. It was provisional and "subject to (i) legal checks; and (ii) a mutually satisfactory outcome to the other aspect of the negotiations on a new Government Procurement Agreement, namely those on an expansion of coverage (i.e. the lists of government entities whose procurement is opened up)."[965] Of particular interest to this study, are new provisions inserted in the revised GPA 2007 which explicitly permitted the Parties to take procurement measures to protect the environment, namely Art. X:6 discussed further in the next sub-section.

7.6.2 Revision of the GPA and the environment-related provisions

The new draft GPA which now explicitly permitted the inclusion of environment-related considerations in public procurement is Art. X:6. It states thus:

> "For greater certainty, a Party, including its procuring entities, may, in accordance with this Art., prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment."[966]

This attempt, for the start, indicates that there is a problem already felt in this area, and that an action needs to be taken. This thus serves a further justification for this study. The provision ostensibly was meant to make up for the GATT Art. XX (g) which was missing in GPA Art. XXIII. Thus to the extent that the Art. GPA XXIII still remains, it is arguable that this new revision does not fundamentally change the

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[964] WTO, at: http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

[965] The revised GPA 2007 is available to the public in the WTO document GPA/W/297.

[966] See Revised GPA 2007 at <http://docsonline.wto.org/DDFDocuments/t/PLURI/GPA/W297.docGPA/W/297>. For more information the revised text see WTO, Provisional agreement on text of revised Government Procurement Agreement at http://www.wto.org/english/news_e/news06_e/gproc_8dec06_e.htm (accessed 15/07/10).

current legal situation under the WTO jurisprudence. It simply re-enforces and expands what the GPA Art. XXIII GATT Art. XX (b) and (g) already provide for. In other words, the usual procedural rules would still apply in an event of an environment-related dispute. That is to say climate-motivated procurement measure still has to pass the *necessity* test, as well satisfy the Art. XXIII *chapeau* still retained in the revised GPA. Therefore, to the extent that paragraph (g) of the GATT is no longer crucial as suggested earlier by Cottier,[967] the new Art. X:6 is logically redundant in the face of GPA Art. XXIII.

Again, if the new Art. X:6 stands alone, and independent of the current GAP Art. XXIII exceptions, then it is dangerously susceptible to manipulation and abuse, as it has no limits or conditions attached to its application. The missing limits and conditions here are in the form of those suggested for the new norm to include the list of CGS and climate-motivated projects to which climate-related procurement should relate. These are the type of conditions that regulate the operation of the Enabling Clause, and the conditions set for the maintenance of technical regulations under the TBT and SPS agreements.

Thus, in line with the analysis made earlier in this section, the current review exercise of the GPA should proceed, and further modify Art. X:6 so as to give effect to the proposal for explicit permit for climate-motivated procurement. The purpose as explained earlier is to give Parties to climate regime pursuing their commitments thereunder to have free hand to do so through their procurement policies. This approach ultimately will serve the spirit of seeking legal coherence between the climate change regime and trade regulation, and to enable the WTO system play a more practical role in the fight against climate change challenge.

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[967] See *supra, n.* 546, p. 18.

It is suggested further that part of the conditions to be inserted in the new provisions should include those that would also address the concerns of the developing countries as relates their development level and the capacity to participate in the climate-friendly procurement processes permitted in the new provisions. This aspect should be included in the new provisions pursuant to the principles guiding the implementation of the climate regime. [968]

Figure 4 The proposed modification of Art. X:6 of the Revised GPA 2007

For greater certainty, a Party, including its procuring entities, may, in accordance with the provisions of this Article, prepare, adopt, or apply technical specifications for goods and services be procured, conditions for supplier participation or award criteria, to protect the environment, and in particular, to promote the stabilisation of the concentration of anthropogenic GHG emissions in accordance with the provisions of the United Nations Framework Convention on Climate Change and its implementing Protocols:

—Provided that:

(1) a party maintaining climate-change related measures shall have the duty to establish the bearing of the measures to the list of climate related goods, services, technology, projects and programmes provided for in Appendix …. to this Agreement.

(2) where substantial investments are required in order for an exporting developing country Member to fulfil the green procurement requirements set by an importing developed country Member, in a particular procurement, the latter shall assist in providing such technical assistance as may enable the developing country Member to participate in, or and benefit, from the procurement opportunities.

Thus, the pre-determination of what constitutes climate friendly goods and services, and projects serves inter alia the following objectives:

[968] See Chapter 4, section 4.4.3. See generally, Malumfashi, G. I, *'Phase-out of gas flaring in Nigeria by 2008: the prospects of a multi-win project (Review of the Regulatory, Environmental and Socio-Economic Issues)', Petroleum Training Journal* Vol. 4 No. 2. July, 2007 (available at: http://www.nccr-trade.org/images/stories/publications/IP6/Nig_GasFlaring_Petroleum%20Training%20Journal%20(PTJ)%20Vol%5B1%5D.%204%20No.%202%20July%202007.pdf

a) incorporates all the negotiating proposals before Doha related to the liberalisation of EGS, namely, list-based, project-based, and the combination of them all;
b) It makes it easier for both the procuring authority and prospective suppliers to identify or verify the products and services in the particular green procurement as climate friendly.
c) It affords the procuring authority an opportunity to seek legal justification for the procurement as being *prima facie* motivated by climate change concerns. All it needs to do, in an event of challenge, is pin-point how the procurement is related to the list;
d) It makes it easier for suppliers to supply what is clearly already identified through the indicative list. This makes a good case for transparency in government procurement.

With this approach, therefore, GPP could also assist in the efforts to achieve coherence in the international system as enunciated under the WTO system as in the preamble to the WTO Agreement and in the *Ministerial Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking*.[969] This approach is also strengthened by the CTE endorsement that "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature" and said it preferred that trade disputes arising in connection with a multilateral environmental agreement be resolved through the mechanisms established by that agreement.[970]

[969] See WTO, *Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic policymaking*, by Minister in Marrakesh on 15 April, 1994.
[970] See The Declaration on Trade and Environment, supra n. 18. See also WTO Doc. WT/CTE/1, para. 171, (1996).

7.7 Summary

This chapter examined the extent of the policy space provided by the GPA Art. XXIII on the general exceptions for climate-friendly procurement policies. It highlighted the transition in the multilateral trading system from the conservatism and phobia for environmental protection under the GATT as indicated especially by the *Tuna Dolphin I and II* Panels to a more liberal and pragmatic approach, of the WTO era as exemplified by inter alia, AB in *US-Shrimp*, *EC-Asbestos*, and *Brazil Tyres* rulings. It also indicated how, through the legal texts, the WTO trade liberalisation mission could be made more amenable and responsive to climate change mitigation demands. A case was made for climate change to receive the special and urgent attention it much deserves as among the environmental challenges facing the globe. This led to a suggestion that the amended GPA 2007 draft should be further modified to reflect this outlook for climate change. The specific suggestion is to modify the newly inserted Art. X:6 to permit climate-friendly procurement pursuant to the impending results of Doha negotiations on liberalisation of EGS/CGS. This will facilitate the attainment of multiple advantages to serve the climate change, trade and development concerns.

CHAPTER 8

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

8.1 Introduction

This research was an enquiry into the legal issues arising in the emerging concept of “green” procurement from the stand-point of the provisions of the WTO GPA. It investigated the policy space available under the trade law for pursuing climate change mitigation objectives, particularly GHG emissions reduction, through government procurement. GPP is a government purchase or contracting system by which environment-friendliness and energy-efficiency attributes of products and services and services suppliers, play a major decision-making factor. As government procurement is a subject of international trade, the research looked at the extent to which GPP, being an environment-related measure, could be placed within the context of trade-environment interactions and discourses. The main issue is how GPP conforms to, or is constrained by, the non-discrimination limits set by relevant provisions of the GPA. Similarly, the study examines how the GPA could be made more amenable to the global climate change mitigation drives.

With the rising awareness created by the increasing enlightenment from the scientific and economics communities, climate change has now gained recognition as a peculiar global environmental problem. Policy makers are convinced that climate change is a global emergency, the solution to which requires not only a multilateral approach, but also utilization of all available policy options at both national and global levels. It is also accepted that inaction or a delay now to address climate change will entrap humanity into an uncertain future catastrophe which will be costlier to cure. Consequently, the use of measures like GPP, to address climate change, is seen as preventive action in the spirit of “precaution” within the meaning

of the term under the UNFCCC Art. 4. The motive of such measures would be to avert the danger of future climate-related catastrophes the solution to which may be impossible or much more costly to bear.

In order to establish the parameters within which to conduct this research, initial research questions were posed, as follows:

1. In pursuing *green* government procurement policies pursuant to their climate change mitigation goals, how will the GPA Parties also safeguard their non-discrimination and transparency obligations under the GPA?
2. Could climate-motivated government procurement be effectively accommodated under GPA Art. XXIII on environmental exceptions as it currently is? Or will there be need for amendment?

In attempting to address this question, the research adopted mainly doctrinal method otherwise referred to as *Black-Letter* approach to analyse the primary legal authorities as interpreted by judicial bodies. This method was considered appropriate because it helps to, in a systematic manner, categorise and analyse legal sources and examine how these were interpreted in decided cases in different contexts.[971] This approach is complemented by an interdisciplinary and critical legal approach. This combination made it possible for the author to look at the effectiveness of the legal texts from current implementation experiences and to make suggestions for amendment considered desirable. This work made use of primary legal authorities including the text and official interpretations and explanations of the UNFCCC and Kyoto Protocol as well as the WTO treaty and the

[971] See Chynoweth, P., *Legal scholarship: a discipline in transition*, (Editorial From: International Journal of Law in the Built Environment, Volume 1, Issue 1) (The servant of the legal profession), available at: Emerald Journal News: http://info.emeraldinsight.com/products/journals/news_story.htm?PHPSESSID=1ltaudjamcc2vt0vf0fgkkgbs0&PHPSESSID=1ltaudjamcc2vt0vf0fgkkgbs0&id=1473 (accessed on 18/07/09).

annexed agreements, particularly the GPA. Consulted also were secondary materials in terms of books and published journal articles written by experts, and in which the primary sources were analysed and explained. Attempts were also made to consult experts on the subject.

The major strength of this study is that it highlighted the interrelationship between the two major themes of particular global significance, namely climate change and trade, and how the subject of Government Procurement links them up together. The significance of this linkage is to draw the attention of policy-makers of the potential opportunities for policies that pursue the objectives of trade liberalization and the climate concurrently without fear of contradiction. This linkage also will help allay any *regulatory chill*[972] as may be entertained in thinking that climate-motivated procurement measures undermine the Parties' GPA obligations, and are liable to face complaints before the WTO dispute settlement system.

The research was organised in 8 chapters divided into 3 parts as follows: Part 1 consists of chapters 1 and 2. It laid down the foundations for the research, and explained its objectives and goals, as well as the approaches adopted. Part 2 is comprises chapters 3, 4 to 5, which, in the main, were descriptive of the major themes, as well as the analytical framework of the research. Finally, Part 3 which is composes of chapters 6-8 was essentially analytical. Arguments were presented in chapter 6 and 7. These led to conclusions and recommendations, as well as suggestions for further research chapter 8.

[972] "Regulatory chill" is a controversial concept. In simple terms, it suggests a situation where countries hesitate in taking certain regulatory measures so as to avoid undermining their obligations under other instruments which may trigger international dispute settlement procedure. See Kirton, J. J. and Hajnal, P. I., Sustainability, civil society and international governance - Local, North American and Global Contributions, (Ashgate; illustrated edition, 2006), p 3.

8.2 Main research findings

8.2.1 GPP and the Interaction of climate change and the WTO system:

The main theoretical basis of this research is that GPP which is an element of government procurement in which secondary procurement goals are pursued is potentially discriminatory. This is based upon the premise that pursuing secondary goals of procurement may raise issues of discrimination and protectionism. The WTO's primary objective is to eliminate discrimination and protectionism in trade policies of the Members. On the other hand, climate change is increasingly being recognised not only as an environmental issue but also a socio-economic and development phenomenon. It is generally accepted as an issue of common concern for human kind and should be addressed squarely.

Anthropogenic climate change is caused by the fossil energy sources. These sources provide for most of the global energy need. This factor coupled with the other factors[973] that characterise the current global energy sector all combined to call for the formulation of policies for support for development of new and renewable energy sources, and indeed the general re-orientation of our life-styles towards energy efficiency and energy sustainability. In particular, the climate change challenge phenomenon is characterised by the following considerations:

a) Climate change affects the energy sector and therefore affects the energy policies of the WTO Members. Indeed in jurisdictions like the EU that have ambitious climate change commitments climate change is regarded as an energy security concern. Paradoxically also, climate change catalyses energy efficiency and energy sustainability approach to production and consumption. Adoption of GPP policies is an example of this side impact of climate change.

[973] These factors are subject of other studies. They include high and fluctuating prices of energy, and the exponential increase in energy demand especially in economies in transition and the newly industrializing developing countries of China, India and Brazil.

b) Climate change raises ethical issues of equity and fairness. This is seen in the fact that industrialisation era of the developed nations caused the present experience of the changing climate, and that the developing and the least developed countries are being worst hit by the impacts of climate change;
c) Climate change is not only a cross-border environmental problem, but global in nature: GHG emissions, regardless of their origin, accumulate into atmosphere to contribute to the warming which results in the changing conditions of the climate.
d) The future ecological effects, as well as consequences of climate change are still very uncertain and unpredictable. Hence, this calls for taking precautionary measures to prevent the occurrence of harm the magnitude of which will be more costly in terms of human life and finance to bear if no serious action is taken now.

This realisation positions climate change as a peculiar environmental problem which is different from other conventional cross-border environmental problems, and the solution to which requires multilateral approaches and cooperation among all nations and institutions, as well as a combination of different response measures. It is also on this premise that government procurement was identified by the IPCC, and then encouraged by the climate regime, as among the policies and measures that potentially could help in addressing the global climate concerns.

From the review of literature, the interaction between green procurement, climate change mitigation, energy and international trade regulation, seems even more complex than the usual the trade-environment interaction has been. This is because, to start with, the literature generally appeared to be dispersed and inadequate. Also, the complexity was accentuated by the generalist manner the issue of environment has been addressed in trade regulation. That is to say the issue was addressed from the perspective of the broader trade and environmental interaction. This therefore indicated the need for an in-depth research which will

inter alia streamline the arguments and thereby contribute in filling part of the gap prevailing in the existing literature which addresses the defined area of this interaction.

8.2.2 The GPA regulation of GP and the GPP question

At the outset, this research noted that GP conventionally is an instrument for governments to acquire goods and services for their everyday governmental functioning at the lowest price and best quality possible. This is the concept of *value for money* objective of procurement. However, GP was also traditionally used by governments as a tool to pursue *non-economic* objectives including social and environmental. This is in view of the significantly large amount of resources and power involved in GP, which, if channelled in the direction of climate-friendly goods and services as well as suppliers of those goods and services, would benefit not only climate change goals, but also sustainable economic development at large. Specifically, therefore, GPP catalyses investment and innovation in climate friendly technology and boosts markets which in the long run also brings prices down.

However, GP is a special subject of international trade law. It is regulated by the GPA. The GPA requires Parties to observe the non-discrimination norms in their procurement laws, practices and processes. Parties are not allowed to accord less favourable treatment to goods and services of one Party over other Parties', or even discriminate between products or services themselves in the domestic market situation. And GPP gives preference to climate-friendly goods and services and suppliers over others in the same category. It is a fact that some jurisdictions, notably the EU, are more committed to addressing climate change and so their productions processes as well as consumption patterns are generally cleaner. Therefore, any preferences in favour of climate-friendliness of goods and services will potentially have disproportionate impacts against those other countries that are less committed to climate change. Effectively, therefore, GPP falls under the "non-

trade" concerns which impacted on the WTO Members' national regulatory spheres vis-à-vis their non-discrimination obligations towards each other. These concerns have been subject of intense discussions and debate under the trade rules. Of course, the GPA in line with the tradition of the GATT/WTO system has brought about general exceptions provisions to accommodate measures targeted at non-economic objectives, including by default, environment-related measures.

The GPA Art. VI requires the use of internationals standards, national technical regulations, eco-labelling as the basis for technical specifications in tender notices. This highlights the relevance of the environment and energy issues to procurement systems.[974] These are the main areas that raise trade concerns. This is because issues of PPMs as well as transparency usually arise in those areas. As regards the setting of technical specifications, thus the GPA states:

- that technical specifications for contracts must generally "be in terms of performance rather than design or descriptive characteristics."[975]
- that technical specifications "shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade."[976] And finally
- that the conditions that may be imposed on a prospective supplier for getting or bidding for a government contract must be "limited to those which are essential to ensure the firm's capability to fulfil the contract"[977] and not on environmental performance.

[974] See *supra,* Chapter 6.

[975] GPA Art. VI:2(a)

[976] GPA Art. VI:1

[977] GPA Art. VII(b)

On the other hand, the GPA rules on transparency requirement are linked to the use of green technical specifications as stated above. These in the main include that technical specifications should:

a) be included and defined from the very beginning of the tendering process as these must be communicated in the tender document;
b) Sufficient time must also be given for the prospective tenderers to submit tenders, or to comply with participation requirements;

Where they relate to the product and service, technical specifications must

a) be in terms of performance rather than design or descriptive characteristics;
b) be sourced from recognised international standards or national technical regulations, building codes, and certified by ecol-labelling scheme.

Where they relate to the service provider, they must relate to the subject-matter of the contract and the technical qualification and financial capability of the contractor to carry the specific job in question.

Accordingly, where there is complaint against a climate-motivated procurement measure which results in either from the manner the technical specifications are set (for example, where specifications are based on non-product-related energy efficiency standards), or that the procuring entity disregarded transparency requirements which results in (de-facto) discrimination against foreign business, then the environmental exceptions, provided for in GPA Art. XXIII, may provide the defendant with recourse for justification. The thesis addressed this question, and the findings are presented in section 8.2.4

8.2.3 Policy space and scope for GPP under the GPA and EU

The EU GPP system was used as illustration in this research. The research found that on the face of it, policy space potentially exists for GPP both under the WTO GPA and the EU systems. While under the GPA, GPP could only be potentially

defended under the general exceptions, the EU system, as up-graded by the EU new public procurement directives (Directives) is generally richer and more explicit in the substantive provisions than GPA's approach. The technical legal issues are considered in section 8.2.4.

As for the scope made available for public entities to use climate-friendly procurement policies, the EU GPP law and policy could provide a general model. The EU GPP system is essentially based on the judgment of ECJ in *Concordia Bus Finland* case.[978] The Court held in that case that for the purpose of attainment of the "most economically advantageous" tender under the relevant procurement directives,[979] procurement authorities were allowed to also incorporate environmental considerations in their energy procurement. The technical specifications inserted in the tender documents, however:

- should be linked to the subject matter of the contract;
- do not give the contracting authority unrestricted freedom of choice; [980]
- are applied in conformity with the applicable Directive's rules; and
- comply with fundamental principles of Community law especially non-discrimination.

In general terms, comparison between GPA and the EU GPP system revealed that the major difference between the two systems hinges both on substance as well as style. While the GPA does not explicitly permit the inclusion of environmental

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[978] *Concordia Bus Finland case*, *supra,* n.739. See Kuzlik, P., *Green procurement under the new regime*, in The New EU Public Procurement Directives, (Copenhagen, Djof Publishing, 2005), pp. 142-144.

[979] The EU New Public Procurement Directives (see Chapter 6)

[980] In Case T-4/01 *Renco SpA v. Council of the European Union*, judgment of 25th February 2003, the Court of First Instance, whilst purporting to apply the principles in *Concordia Bus Finland*, ignored or overlooked the requirement that award criteria must be such as not to give the contracting authority an unrestricted freedom of choice. See Peter Braun, "The use of qualitative award criteria and the difference between award and qualification criteria: a note on T-4/01 Renco SpA v, Council of the European Union (2003) 5 *Public Procurement Law Review* NA116. Braun rightly concludes that the case in fact "deviates from the requirement of Concordia Bus Finland" as regards this point.

considerations, but reduces them to the general exceptions, albeit in "incomplete" fashion, the EU system, based on both statute and case law, made the permission for GPP very explicit. This therefore presupposes that while, under the EU, environmental considerations are an established norm in the legal sources; it is still an issue of debate, under the WTO law, where the matter is treated as an exception rather than norm. Thus, a GPA Party who maintains a climate-friendly procurement has the strict onus to prove it as justifiable under the exceptions.

The above state of affairs should not come as a surprise. This is because the WTO considers itself as strictly "trade" body. As such, issues that are regarded as "non-trade concerns" including the environment are merely incidental matters, hence handled with indifference or caution.[981] On the other hand; the EU, which is much more than a "trade" body, is proactive in its integration of the environment and sustainable development into all other policies. In particular, the EU is conscious of its commitments under the climate regime. Hence, considering the climate change mitigation potential of public procurement the EU integrated GPP in its overall climate and energy policies.[982]

8.2.4 The GATT and GPA general exceptions: a closer look at the texts

On the question whether discriminatory GPP is defendable under the GPA Art. XXIII general exceptions, the answer seems to be in the affirmative, at least on the face of it. This is in view of the recognition by the WTO system, of the need to protect the environment and promote sustainable development, as enshrined in the Preamble to the WTO Agreement. The Preamble is thus the foundation for the interpretation of the GATT Art. XX (b) and (g) which justifies environment related GATT-inconsistent measures. The *US – Shrimp* was the initial test case that laid the ground for this

[981] See for instance Bhagwati, T J., The World Trading System At Risk, Princeton University Press, US, 1992) (based on the 1990 Harry Johnson Lecture delivered in London).

[982] See Malumfashi, G. I. *supra,* n. 11.

environment friendly interpretation. This interpretation was followed in many other subsequent rulings including *US – Gambling* and most recently, *Brazil – Tyres*.

On the other hand, to accept the above as the answer to the question posed earlier may seem just too simplistic. To start with, this study discovered that none of the environment-related disputes, numbering about seven in all in the history of GATT/WTO actually scaled through the chapeau to the GATT Art. XX. Indeed, even the AB ruling in the *US – Shrimp* dispute, so celebrated as it is, appeared only as paying lip-service to the environment. There, the AB, using the so-called evolutionary approach, accepted the shrimp conservation measure by the US as covered by the AB under XX(g). Then the AB denied the measure as contravening the XX chapeau. But even the acceptance of the measure under the XX(g) was objectionable at various quarters, including from Bhagwati[983] and Kelly.[984] But also, the denial of the measures was based on a consideration which arguably is extrinsic of the text of GATT Art XX: failure of the US to hold negotiations in good faith with the Complainants, with a view to finding a multilateral solution to the problem.

US – Gambling came to contradict the bases upon which *US – Shrimp* ruling was established as stated above. The AB in *US – Gambling* faulted the requirement of negotiations as reason for discrimination contrary to the chapeau to GATS Art. XIV.

Brazil – Tyres too accepted environmental measures under XX(b) but rejected the measure under the chapeau, holding that Brazil should not have exempted MERSOCUR Countries, and should not have permitted import of used tyres while banning import of retreaded tyres. These two actions did contract Brazil's purpose of the total import ban, namely, the health and environmental concerns resulting

[983] See Bhagwati, J., *supra,* n. 60, p. 133.

[984] *Ibid.*

from accumulation of used tyres. Thus, the inconsistencies still remained in the trade-environment jurisprudence. On the over all, the constraining posture of the chapeau was still in-tact even after *Brazil – Tyres*.

Indeed, the study observed that the extent to which GPA Article XXIII covers environment related measures is still doubtful, for the GPA "lacks a general exception for the environment or for measures relating to the conservation of exhaustible natural resources."[985] Even where the GPA Article XXIII is accepted as referring to the environment, then it is not entirely safe to apply the AB interpretation of GATT Art. XX(b) and (g) in the *US – Shrimp* dispute. This is because, inter alia, there are textual disparities between the provisions of the GATT and those of the GPA on both the non-discrimination norms, and the exceptions. For example:

a) The main premise of the GATT Article XX is the GATT's non-discrimination rules in Art. I and III which prohibit discrimination between "like" products. The GPA Art. III on non-discrimination, however, does not use the term "like" products or any other term which denotes *likeness*. So, at the outset, there is uncertainty what the basis of the prohibited discrimination under the GPA Art. III will be. This argument sounds technical, but can well have practical significance;

b) The GATT Art. XX exceptions under paragraphs (b) and (g) for environment-related measures permit measures which, in the pre-WTO era did not include environmental measures that were based on non product related PPMs. These were however accepted by the AB interpretation of the WTO era. On the textual issues specifically, the part of GPA Art. XXIII which relates to environmental exceptions is not identical with the GATT Art. XX(b) and (g): in GPA's provision, the "(g)" part is omitted as stated above.

[985] See Hufbauer, G. C., Charnovitz, S. and Kim, J., *supra,* n. 25. The XX (g) allows measures "related" to conservation of exhaustible natural resources, that is to say, the environment

These disparities are relevant for two broad and practical reasons, namely, (a) the WTO "single-undertaking" norm which has excluded the GPA; and (b) the fact the GATT (as well as GATS) has excluded its regulatory authority over governmental purchases for governmental functioning. It is the GPA that now regulates this sector, even with the lacunae observed in its (GPA's) text. Thus should there be a climate-related dispute that touches upon "like products" question, or an item which falls under XX(g), it is not clear how a dispute settlement body will apply the GPA. If the GPA is not amended, then recourse must be had to the GATT.

8.2.5 Climate-related procurement measure and the 'burden of proof'

Apart from the above observations, especially as they relate to the textual problems between the relevant GATT and GPA provision, the research assumed, for the sake of argument, and in view of the said *single-undertaking* posture of the WTO system which itself is controversial, that climate-friendly procurement measure would be covered by the general exceptions. However, there is also the procedural aspect which could constitute another problem. In fact, the eventual conclusions of this research are hinged more on this aspect. This is to do with procedure for establishing the extent to which a measure is covered under the exceptions.

The conventional "GATT-specific" approach, as Howse lamented,[986] is for the Party who invokes the non-trade related measure as an exception to a trade liberalization norm to prove it before the dispute settlement body. This proof, regardless of whether the measure is based on de-jure or de-facto discrimination, will require the strict proof of "necessity" of the measure. In the same vein, the measure must satisfy the requirements of the "*chapeau*" – the introductory paragraph of the Art. XX (in this case, GPA Art. XXIII). As these provisions have proved extremely technical, the proof process has always been very onerous and time-consuming. They also

[986] See Howse, R, *supra,* n. 924, p. 110.

tend to encroach upon the domestic regulatory authority of the WTO Members, which they seek to safe-guard. It is in this wise that Hudec suggested that origin-neutral measures, which is usually the design taken of GPP measures, should not be subjected to the same strict level of proof as (required in the case of) the overt discriminatory measure. He based his argument of the position under the EU law.

What this means is that whenever a GPA Party engages in climate-motivated procurement measure that Party should be "commended" or even rewarded for showing practical concern for the climate. Indeed, economists consider this act as an effort to deliver global public good[987] which is also very costly. Therefore, asking the Party to "prove" the measure, because it came under the "exceptions" may tantamount to "punishing" the Party for doing the right thing. In this situation, this Party will be entertaining "regulatory chill," namely, the potential of being dragged to the WTO dispute settlement to prove the "necessity" and the "*chapeau*" of the measure. This is also quite apart for the fact that, as the jurisprudence has shown, the yardstick to measure the chapeau requirements has became elusive to the dispute settlement bodies.[988]

[987] See Carraro, C. and Egenhofer, C., *supra,* n. 43.

[988] There are other areas of concern in the analysis of GPP processes against the GPA provisions as well as other agreements under the WTO's single-undertaking rule. Such areas were identified and discussed in Chapter 3 and 6. They mostly relate to issues of transparency and PPMs as emanating from use in GPP process, of international standards, national technical regulations and so on, which are subjects covered by TBT and SPS Agreements. They include the provisions on:

a) transparency in government procurement
b) technical specifications of the subject-matter of procurement
c) supplier conditions for participation contract award criteria

8.3 Recommendations

8.3.1 Provide for climate-friendly procurement as a positive norm

There is an opportunity to more effectively address the issues of climate-friendly procurement under the WTO, and make WTO more amenable to sustainable development through government procurement. This can be done amending the GPA in such a way as permit climate-motivated procurement as a norm rather having to be proved under the exceptions. There are so many problems observed associated with these exceptions. So avoiding them completely will go a long way to secure multiple benefits: to the climate change, to the GPA parties (and potential parties including developing countries), and to the multilateral trading system as a whole. Sections 7.5 and 7.6 of this chapter made a case for the desirability, and purpose and objective of this arrangement. There is also a provisional text to support the suggestion. Suffice it to mention here that this suggestion is tantamount to giving climate change the due attention it deserves among other environmental problems, as well as securing for the GPA Parties their domestic regulatory authority and smoothing it for them to pursue climate change problem, a problem of common concern.

Thus where climate-friendly procurement is made a norm, relevant conditions as to effectiveness of the measure could be attached to it, so as to prevent or minimise abuse. For instance, the suggested provision could provide that such procurement in question should relate to the procurement of climate good and services (CGS) or climate projects as defined in a list to be agreed [possibly at Doha EGS (CGS) negotiations] and annexed to the GPA as an Appendix. A reference paper approach could also be used to indicate the list of the CGS and related projects. Thomas Cottier even suggests that projects here could mean or include such projects as are eligible for Clean Development Mechanism (CDM) under the Kyoto Protocol. Any item on that list would be eligible for concessional procurement.

Meanwhile, the provision of Art. XXIII will remain in the GPA to work as a normal exception for other environment related measures which fall outside specific climate-friendly EGS. The revised version of the GPA 2007 which is currently not in force could provide an appropriate and timely opportunity to effect these proposals.

8.3.2 The GPA 1994 revision and the Revised GPA 2007

The revision of the GPA which was started in 2004, and concluded in 2006, and produced the Revised GPA 2007, is considered as a further justification for this study. The review has inserted a new provision (Art. X:6) which explicitly permits the GPA Parties to include environmental consideration in their procurement activities. This is the approach of the EU which, in 2004, issued the Directives to make explicit the permission for inclusion of environmental considerations in the processes. This new Art. X:6, however, is more or less a codification of the missing GATT XX(g). It thus does not fundamentally change the legal uncertainty. Indeed, this change does not affect the procedural rule which require the defendant to strictly prove environment related measure. Thus, the review process affords opportunity to make further modify the said Art. X:6 in line with the recommendation of this research.

8.3.3 Further research

Some questions arose in the course of the research which may require further in-depth consideration. These are highlighted below:

8.3.3.1 The GPP and the developing country concerns

It has been noted in chapter 5 that environmental standards are a thorny issue for developing countries in view of their generally low capacity to produce or even consume in a cleaner manner. Thus a proposal for an amendment which explicitly authorises climate-friendly procurement may shut the developing countries out or further distance them away from acceding to GPA. Thus, this unintended consequence should have to be looked into, and with a more in-depth research.

Provisionally, however, the amendment suggested in this study has made provision too which c minimise the overall impacts of the new proposal on the developing countries. The provision in the amendment has incorporated some safe-guards to take care for their concerns. This approach is not new, and it has been adopted in the SPS agreement. This Agreement made special provisions under Art. 8 for technical assistance to be extended to developing countries with a view to enabling them to more them properly implement it provisions. Indeed, the principles of equity and fairness and common but differentiated responsibilities, in the climate regime, require that developing countries be assisted and be carried along in the fight against climate change. Works of Bhagwati related to this issue would be valuable in such a research.

A related question here is in view of the fact that climate change mitigation can hardly be effective without the participation of the developing countries, to what extent can the developed countries “utilise” the developing countries through liberalised and green procurement policies to achieve their climate change objectives?

8.3.3.2 Non-Kyoto Countries and GPP in the light of EC – Biotech ruling[989]

The *EC – Biotech* ruling, inter alia, emphasized that a WTO Member cannot rely on its obligations under another treaty to act inconsistently with the provisions of WTO agreements. This may be allowed, pursuant to Art. 31 through 33 of the Vienna Convention on the Law of Treaties (VCLT), only if the treaty is "applicable in the relations between the parties"[990] to the dispute. Thus, as the US, the complainant in this dispute was not a Party to, as such not bound by, the said Protocol, the Panel refused to take into account of the EC’s obligations under the Protocol to interpret EC’s obligations under SPS agreement. This aspect of the ruling has of course

[989] See *supra,* Chapter 7 Section 7.3.2.2.

[990] *EC – Biotech (*Panel*),* para. 7.75.

been described as controversial by prominent commentators including Thomas Cottier, as well as environmental and human rights groups. The source of the controversy may well be the AB's emphasis that the GATT should "not to be read in clinical isolation from international public law".[991] Accordingly, the Protocol could be regarded as a *lex specialis, and could be* useful in interpreting the WTO rules.[992] In the light of the said ruling, to what extent could a Kyoto Party (EU, for example) maintain a climate protection argument for its discriminatory or trade restrictive GPP against a non-Party (e.g., US) that is not bound by the KP?

8.3.3.3 The GATT Art. XX(d) and GPP in the light of Mexico - Soft Drinks

This question relates to the one above (para. 8.3.3.2) but is more general. It is to do with the question: how could the provisions of GATT Art. XX(d) (which permits a measure aimed at securing compliance with provisions of other law which is not inconsistent with the provisions of the GATT), be extended to climate-friendly measures to secure compliance with a treaty like the Kyoto Protocol. In other words could "other law" in GATT Art. XX(d) be interpreted to include an international treaties, especially, in view of the fact, in this case, that both GATT and climate regime aim at sustainable and economic development*?* In the *Mexico – Soft Drinks* ruling inter alia suggest that such an interpretation was not contemplated, and the other law here referred to domestic law of the party maintaining the measure complained of.[993]

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[991] *US – Gasoline (ABR),* p. 17. See Pauwelyn, J., *Unity and Fragmentation In International Law (Palma Workshop, 20-21 May 2005)* [Introductory Report On The World Trade Organization], available at: http://eprints.law.duke.edu/1314/1/unityandfragmentationininternationallaw.pdf (last accessed 20/10/09).

[992] See Suppan, S., *U.S. vs. EC - Biotech Products Case, WTO Dispute Backgrounder*, (Institute for Agriculture and Trade Policy Trade and Global Governance Program, 2005), p. 3.

[993] See *Supra,* para. 7.4.1.2

8.3.3.4 Whether GPP amounts to injurious subsidy

To what extent can climate-friendly procurement amount to an indirect subsidy given to the industry producing climate-friendly goods and services as to trigger action based of the WTO Agreement on Subsidies and Countervailing Duties?.

8.4 Concluding Remarks

The ultimate aim of this research was to see the possibility of streamlining polices aimed the environment and sustainable development with those of international trade regulation. Thus, the main proposal of the thesis, namely, a targetted amendment of the GPA, more specifically, presents government procurement as a tool under the WTO system, to contribute to the overall efforts to establish coherence between the environment, energy and trade spheres of global governance. Although the proposal relates to government procurement only, it is, nevertheless, relevant in addressing the wider trade–environment conflict. Indeed, the proposal can be adapted to address all the legal and policy controversies related to the other so-called *non-trade concerns,* which pose real challenges to the subsistence of the WTO system.

APPENDICES

APPENDIX I
SELECTED PROVISIONS FROM THE GENERAL AGREEMENT ON TARIFFS AND TRADE

PART I

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(*a*) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(*b*) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(*c*) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(*d*) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, l923, provided such preferences are approved under paragraph 5† of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference* on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(*a*) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, l947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(*b*) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most favoured- nation and preferential rates existing on April 10, 1947. In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraph (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex.

Article II

Schedules of Concessions

1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(*c*) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(*a*) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(*b*) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

(*c*) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper

authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter
promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (*a*) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(*b*) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

Article III*

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*

2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*

3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, l947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.

4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, l948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (*a*) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(*b*) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematograph films and meeting the requirements of Article IV.

PART II

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

(c) relating to the importations or exportations of gold or silver;

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

APPENDIX II

SELECTED PROVISIONS FROM THE AGREEMENT ON GOVERNMENT PROCUREMENT

PART I

The Preamble

Parties to this Agreement (hereinafter referred to as "Parties"),

Recognizing the need for an effective multilateral framework of rights and obligations with respect to laws, regulations, procedures and practices regarding government procurement with a view to achieving greater liberalization and expansion of world trade and improving the international framework for the conduct of world trade;

Recognizing that laws, regulations, procedures and practices regarding government procurement should not be prepared, adopted or applied to foreign or domestic products and services and to foreign or domestic suppliers so as to afford protection to domestic products or services or domestic suppliers and should not discriminate among foreign products or services or among foreign suppliers;

Recognizing that it is desirable to provide transparency of laws, regulations, procedures and practices regarding government procurement;

Recognizing the need to establish international procedures on notification, consultation, surveillance and dispute settlement with a view to ensuring a fair, prompt and effective enforcement of the international provisions on government procurement and to maintain the balance of rights and obligations at the highest possible level;

Recognizing the need to take into account the development, financial and trade needs of developing countries, in particular the least-developed countries;

Desiring, in accordance with paragraph 6(b) of Article IX of the Agreement on Government Procurement done on 12 April 1979, as amended on 2 February 1987, to broaden and improve the Agreement on the basis of mutual reciprocity and to expand the coverage of the Agreement to include service contracts;

Desiring to encourage acceptance of and accession to this Agreement by governments not party to it;

Having undertaken further negotiations in pursuance of these objectives;

Hereby *agree* as follows:

Article I

Scope and Coverage

1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.1

2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

3. Where entities, in the context of procurement covered under this Agreement, require enterprises not included in Appendix I to award contracts in accordance with particular requirements, Article III shall apply *mutatis mutandis* to such requirements.

4. This Agreement applies to any procurement contract of a value of not less than the relevant threshold specified in Appendix I.

Appendix I.

For each Party, Appendix I is divided into five Annexes:
- Annex 1 contains central government entities.
- Annex 2 contains sub-central government entities.
- Annex 3 contains all other entities that procure in accordance with the provisions of this Agreement.
- Annex 4 specifies services, whether listed positively or negatively, covered by this Agreement.
- Annex 5 specifies covered construction services.
Relevant thresholds are specified in each Party's Annexes.

Article II

Valuation of Contracts

1. The following provisions shall apply in determining the value of contracts(2) for purposes of implementing this Agreement.

2. Valuation shall take into account all forms of remuneration, including any premiums, fees, commissions and interest receivable.

3. The selection of the valuation method by the entity shall not be used, nor shall any procurement requirement be divided, with the intention of avoiding the application of this Agreement.

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(2) This Agreement shall apply to any procurement contract for which the contract value is estimated to equal or exceed the threshold at the time of publication of the notice in accordance with Article IX.

4. If an individual requirement for a procurement results in the award of more than one contract, or in contracts being awarded in separate parts, the basis for valuation shall be either:

(a) the actual value of similar recurring contracts concluded over the previous fiscal year or 12 months adjusted, where possible, for anticipated changes in quantity and value over the subsequent 12 months; or

(b) the estimated value of recurring contracts in the fiscal year or 12 months subsequent to the initial contract.

5. In cases of contracts for the lease, rental or hire purchase of products or services, or in the case of contracts which do not specify a total price, the basis for valuation shall be:

(a) in the case of fixed-term contracts, where their term is 12 months or less, the total contract value for their duration, or, where their term exceeds 12 months, their total value including the estimated residual value;

(b) in the case of contracts for an indefinite period, the monthly instalment multiplied by 48. If there is any doubt, the second basis for valuation, namely (b), is to be used.

6. In cases where an intended procurement specifies the need for option clauses, the basis for valuation shall be the total value of the maximum permissible procurement, inclusive of optional purchases.

Article III

National Treatment and Non-discrimination

1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall provide immediately and unconditionally to the products, services and suppliers of other Parties offering products or services of the Parties, treatment no less favourable than:

(a) that accorded to domestic products, services and suppliers; and

(b) that accorded to products, services and suppliers of any other Party.

2. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, each Party shall ensure:

(a) that its entities shall not treat a locally-established supplier less favourably than another locally-established supplier on the basis of degree of foreign affiliation or ownership; and

(b) that its entities shall not discriminate against locally-established suppliers on the basis of the country of production of the good or service being supplied, provided that the country of production is a Party to the Agreement in accordance with the provisions of Article IV.

3. The provisions of paragraphs 1 and 2 shall not apply to customs duties and charges of any kind imposed on or in connection with importation, the method of levying such duties and charges, other import regulations and formalities, and measures affecting trade in services other than laws, regulations, procedures and practices regarding government procurement covered by this Agreement.

Article VI

Technical Specifications

1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

2. Technical specifications prescribed by procuring entities shall, where appropriate:

(a) be in terms of performance rather than design or descriptive characteristics; and

(b) be based on international standards, where such exist; otherwise, on national technical regulations3, recognized national standards4, or building codes.

3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.

4. Entities shall not seek or accept, in a manner which would have the effect of precluding competition, advice which may be used in the preparation of specifications for a specific procurement from a firm that may have a commercial interest in the procurement.

Article VII

Tendering Procedures

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner and are consistent with the provisions contained in Articles VII through XVI.

2. Entities shall not provide to any supplier information with regard to a specific procurement in a manner which would have the effect of precluding competition.

3. For the purposes of this Agreement:

(a) Open tendering procedures are those procedures under which all interested suppliers may submit a tender.

(b) Selective tendering procedures are those procedures under which, consistent with paragraph 3 of Article X and other relevant provisions of this Agreement, those suppliers invited to do so by the entity may submit a tender.

(c) Limited tendering procedures are those procedures where the entity contacts suppliers individually, only under the conditions specified in Article XV.

Article VIII
Qualification of Suppliers

In the process of qualifying suppliers, entities shall not discriminate among suppliers of other Parties or between domestic suppliers and suppliers of other Parties. Qualification procedures shall be consistent with the following:

(a) any conditions for participation in tendering procedures shall be published in adequate

(3) For the purpose of this Agreement, a technical regulation is a document which lays down characteristics of a product or a service or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

(4) For the purpose of this Agreement, a standard is a document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or services or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.

time to enable interested suppliers to initiate and, to the extent that it is compatible with efficient operation of the procurement process, complete the qualification procedures;

(b) any conditions for participation in tendering procedures shall be limited to those which are essential to ensure the firm's capability to fulfil the contract in question. Any conditions for participation required from suppliers, including financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of suppliers, as well as the verification of
qualifications, shall be no less favourable to suppliers of other Parties than to domestic suppliers and shall not discriminate among suppliers of other Parties. The financial, commercial and technical capacity of a supplier shall be judged on the basis both of that

supplier's global business activity as well as of its activity in the territory of the procuring entity, taking due account of the legal relationship between the supply organizations;

(c) the process of, and the time required for, qualifying suppliers shall not be used in order to keep suppliers of other Parties off a suppliers' list or from being considered for a particular intended procurement. Entities shall recognize as qualified suppliers such domestic suppliers or suppliers of other Parties who meet the conditions for participation in a particular intended procurement. Suppliers requesting to participate in a particular intended procurement who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure;

(d) entities maintaining permanent lists of qualified suppliers shall ensure that suppliers may apply for qualification at any time; and that all qualified suppliers so requesting are included in the lists within a reasonably short time

(e) if, after publication of the notice under paragraph 1 of Article IX, a supplier not yet qualified requests to participate in an intended procurement, the entity shall promptly start procedures for qualification;

(f) any supplier having requested to become a qualified supplier shall be advised by the entities concerned of the decision in this regard. Qualified suppliers included on permanent lists by entities shall also be notified of the termination of any such lists or of their removal from them;

(g) each Party shall ensure that:

(i) each entity and its constituent parts follow a single qualification procedure, except in cases of duly substantiated need for a different procedure; and
(ii) efforts be made to minimize differences in qualification procedures between entities.
(h) nothing in subparagraphs (a) through (g) shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations, provided that such an action is consistent with the national treatment and non-discrimination provisions

Article XVII

Transparency

1. Each Party shall encourage entities to indicate the terms and conditions, including any deviations from competitive tendering procedures or access to challenge procedures, under which tenders will be entertained from suppliers situated in countries not Parties to this Agreement but which, with a view to creating transparency in their own contract awards, nevertheless:

(a) specify their contracts in accordance with Article VI (technical specifications);

(b) publish the procurement notices referred to in Article IX, including, in the version of the notice referred to in paragraph 8 of Article IX (summary of the notice of intended procurement) which is published in an official language of the WTO, an indication of the terms and conditions under which tenders shall be entertained from suppliers(7) Offsets in government procurement are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade or similar requirements. situated in countries Parties to this Agreement;

(c) are willing to ensure that their procurement regulations shall not normally change during a procurement and, in the event that such change proves unavoidable, to ensure the availability of a satisfactory means of redress.

2. Governments not Parties to the Agreement which comply with the conditions specified in paragraphs 1(a) through 1(c), shall be entitled if they so inform the Parties to participate in the Committee as observers.

Article XXI

Institutions

1. A Committee on Government Procurement composed of representatives from each of the Parties shall be established. This Committee shall elect its own Chairman and Vice-Chairman and shall meet as necessary but not less than once a year for the purpose of affording Parties the opportunity to consult on any matters relating to the operation of this Agreement or the furtherance of its objectives, and to carry out such other responsibilities as may be assigned to it by the Parties.

2. The Committee may establish working parties or other subsidiary bodies which shall carry out such functions as may be given to them by the Committee.

PART II

Article XXIII

Exceptions to the Agreement

1. Nothing in this Agreement shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement indispensable for national security or for national defence purposes.

2. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labour.

Article XXIV

Final Provisions

7. *Reviews, Negotiations and Future Work*

(a) The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the General Council of the WTO of developments during the periods covered by such reviews.

(b) Not later than the end of the third year from the date of entry into force of this Agreement and periodically thereafter, the Parties thereto shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage among all Parties on the basis of mutual reciprocity, having regard to the provisions of Article V relating to developing countries.

(c) Parties shall seek to avoid introducing or prolonging discriminatory measures and practices which distort open procurement and shall, in the context of negotiations under subparagraph (b), seek to eliminate those which remain on the date of entry into force of this Agreement.

APPENDIX III

DIFFERENTIAL AND MORE FAVOURABLE TREATMENT RECIPROCITY AND FULLER PARTICIPATION OF DEVELOPING COUNTRIES

Decision of 28 November 1979
(L/4903)

Following negotiations within the framework of the Multilateral Trade Negotiations, the CONTRACTING PARTIES *decide* as follows:

1. Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries[1], without according such treatment to other contracting parties.

2. The provisions of paragraph 1 apply to the following:[2]

(*a*) Preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the Generalized System of Preferences,[3]

(*b*) Differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT;

(*c*) Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another

(*d*) Special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries.

3. Any differential and more favourable treatment provided under this clause:

(*a*) shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties;

(*b*) shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on a most-favoured-nation basis;

[1] The words "developing countries" as used in this text are to be understood to refer also to developing territories.

[2] It would remain open for the CONTRACTING PARTIES to consider on an *ad hoc* basis under the GATT provisions for joint action any proposals for differential and more favourable treatment not falling within the scope of this paragraph.

[3] As described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and non discriminatory preferences beneficial to the developing countries" (BISD 18S/24).

Nothing in these provisions shall affect the rights of contracting parties under the General Agreement.

(*c*) shall in the case of such treatment accorded by developed contracting parties to developing countries be designed and, if necessary, modified, to respond positively to the development, financial and trade needs of developing countries.

4. Any contracting party taking action to introduce an arrangement pursuant to paragraphs 1, 2 and 3 above or subsequently taking action to introduce modification or withdrawal of the differential and more favourable treatment so provided shall:[4]

(*a*) notify the CONTRACTING PARTIES and furnish them with all the information they may deem appropriate relating to such action;

(*b*) afford adequate opportunity for prompt consultations at the request of any interested contracting party with respect to any difficulty or matter that may arise. The CONTRACTING PARTIES shall, if requested to do so by such contracting party, consult with all contracting parties concerned with respect to the matter with a view to reaching solutions satisfactory to all such contracting parties.

5. The developed countries do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of developing countries, i.e., the developed countries do not expect the developing countries, in the course of trade negotiations, to make contributions which are inconsistent with their individual development, financial and trade needs. Developed contracting parties shall therefore not seek, neither shall less-developed contracting parties be required to make, concessions that are inconsistent with the latters' development, financial and trade needs.

6. Having regard to the special economic difficulties and the particular development, financial and trade needs of the least-developed countries, the developed countries shall exercise the utmost restraint in seeking any concessions or contributions for commitments made by them to reduce or remove tariffs and other barriers to the trade of such countries, and the least-developed countries shall not be expected to make concessions or contributions that are inconsistent with the recognition of their particular situation and problems.

7. The concessions and contributions made and the obligations assumed by developed and less-developed contracting parties under the provisions of the General Agreement should promote the basic objectives of the Agreement, including those embodied in the Preamble and in Article XXXVI. Less-developed contracting parties expect that their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the General Agreement would improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

8. Particular account shall be taken of the serious difficulty of the least-developed countries in making concessions and contributions in view of their special economic situation and their development, financial and trade needs.

9. The contracting parties will collaborate in arrangements for review of the operation of these provisions, bearing in mind the need for individual and joint efforts by contracting parties to meet the development needs of developing countries and the objectives of the General Agreement.

APPENDIX IV

SELECTED PROVISIONS OF THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, AND THE KYOTO PROTOCOL

1. THE OBJECTIVES AND PRINCIPLES OF THE UNFCCC, AND THE COMMITMENTS OF THE PARTIES

Article 2

OBJECTIVE

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Article 3

PRINCIPLES

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

2. The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration.

3. The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.

4. The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

5. The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should

not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

Article 4

COMMITMENTS

1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

(c) Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors;

(d) Promote sustainable management, and promote and cooperate in the conservation and enhancement, as appropriate, of sinks and reservoirs of all greenhouse gases not controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems;

(e) Cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods;
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(f) Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

(g) Promote and cooperate in scientific, technological, technical, socio-economic and other research, systematic observation and development of data archives related to the climate system and intended to further the understanding and to reduce or eliminate the remaining uncertainties regarding the causes, effects, magnitude and timing of climate change and the economic and social consequences of various response strategies;

(h) Promote and cooperate in the full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change, and to the economic and social consequences of various response strategies;

(i) Promote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations; and

(j) Communicate to the Conference of the Parties information related to implementation, in accordance with Article 12.

2. The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national(**1)** policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

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(1) This includes policies and measures adopted by regional economic integration organizations.

(b) In order to promote progress to this end, each of these Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Article 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol. This information will be reviewed by the Conference of the Parties, at its first session and periodically thereafter, in accordance with Article 7;

(c) Calculations of emissions by sources and removals by sinks of greenhouse gases for the purposes of subparagraph (b) above should take into account the best available scientific knowledge, including of the effective capacity of sinks and the respective contributions of such gases to climate change. The Conference of the Parties shall consider and agree on methodologies for these calculations at its first session and review them regularly thereafter;

(d) The Conference of the Parties shall, at its first session, review the adequacy of subparagraphs (a) and (b) above. Such review shall be carried out in the light of the best available scientific information and assessment on climate change and its impacts, as well as relevant technical, social and economic information. Based on this review, the Conference of the Parties shall take appropriate action, which may include the adoption of amendments to the commitments in subparagraphs (a) and (b) above. The Conference of the Parties, at its first session, shall also take decisions regarding criteria for joint implementation as indicated in subparagraph (a) above. A second review of subparagraphs (a) and (b) shall take place not later than 31 December 1998, and thereafter at regular intervals determined by the Conference of the Parties, until the objective of the Convention is met;

(e) Each of these Parties shall:

(i) coordinate as appropriate with other such Parties, relevant economic and administrative instruments developed to achieve the objective of the Convention; and

(ii) identify and periodically review its own policies and practices which encourage activities that lead to greater levels of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol than would otherwise occur;

(f) The Conference of the Parties shall review, not later than 31 December 1998, available information with a view to taking decisions regarding such amendments to the lists in Annexes I and II as may be appropriate, with the approval of the Party concerned;

(g) Any Party not included in Annex I may, in its instrument of ratification, acceptance, approval or accession, or at any time thereafter, notify the Depositary that it intends to be bound by subparagraphs (a) and (b) above. The Depositary shall inform the other signatories and Parties of any such notification.

3. The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties.

4. The developed country Parties and other developed Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.

5. The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention. In this process, the developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties. Other Parties and organizations in a position to do so may also assist in facilitating the transfer of such technologies.

6. In the implementation of their commitments under paragraph 2 above, a certain degree of flexibility shall be allowed by the Conference of the Parties to the Parties included in Annex I undergoing the process of transition to a market economy, in order to enhance the ability of these Parties to address climate change, including with regard to the historical level of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol chosen as a reference.

7. The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

8. In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from the adverse effects of climate change and/or the impact of the implementation of response measures, especially on:

(a) Small island countries;

(b) Countries with low-lying coastal areas;

(c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay;

(d) Countries with areas prone to natural disasters;

(e) Countries with areas liable to drought and desertification;

(f) Countries with areas of high urban atmospheric pollution;

(g) Countries with areas with fragile ecosystems, including mountainous ecosystems;

(h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and

(i) Landlocked and transit countries. Further, the Conference of the Parties may take actions, as appropriate, with respect to this paragraph.

9. The Parties shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology.

10. The Parties shall, in accordance with Article 10, take into consideration in the implementation of the commitments of the Convention the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change. This applies notably to Parties with economies that are highly dependent on income generated from the production, processing and export, and/or consumption of fossil fuels and associated energy-intensive products and/or the use of fossil fuels for which such Parties have serious difficulties in switching to alternatives.

ii. THE COMMITMENTS OF THE PARTIES UNDER THE KYOTO PTOTOCOL

Article 2

1. Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall:

(a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:

(i) Enhancement of energy efficiency in relevant sectors of the national economy;

(ii) Protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol, taking into account its commitments under relevant international environmental agreements; promotion of sustainable forest management practices, afforestation and reforestation;

(iii) (iii) Promotion of sustainable forms of agriculture in light of climate change considerations;

(iv) (iv) Research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies;

(v) Progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments;

(vi) Encouragement of appropriate reforms in relevant sectors aimed at promoting policies and measures which limit or reduce emissions of greenhouse gases not controlled by the Montreal Protocol;

(vii) Measures to limit and/or reduce emissions of greenhouse gases not controlled by the Montreal Protocol in the transport sector; (viii) Limitation and/or reduction of methane emissions through recovery and use in waste management, as well as in the production, transport and distribution of energy;

(b) Cooperate with other such Parties to enhance the individual and combined effectiveness of their policies and measures adopted under this Article, pursuant to Article 4, paragraph 2 (e) (i), of the Convention. To this end, these Parties shall take steps to share their experience and exchange information on such policies and measures, including developing ways of improving their comparability, transparency and effectiveness. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session or as soon as practicable thereafter, consider ways to facilitate such cooperation, taking into account all relevant information.

2. The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.

iii. The Parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties, especially developing country Parties and in particular those identified in Article 4, paragraphs 8 and 9, of the Convention, taking into account Article 3 of the Convention. The Conference of the Parties serving as the meeting of the Parties to this Protocol may take further action, as appropriate, to promote the implementation of the provisions of this paragraph.

iv. The Conference of the Parties serving as the meeting of the Parties to this Protocol, if it decides that it would be beneficial to coordinate any of the policies and measures in paragraph 1 (a) above, taking into account different national circumstances and potential effects, shall consider ways and means to elaborate the coordination of such policies and measures.

Article 3

1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

2. Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol.

3. The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990, measured as verifiable changes in carbon stocks in each commitment period, shall be used to meet the commitments under this Article of each Party included in Annex I. The greenhouse gas emissions by sources and removals by sinks associated with those activities shall be reported in a transparent and verifiable manner and reviewed in accordance with Articles 7 and 8.

4. Prior to the first session of the Conference of the Parties serving as the meeting of the Parties to this Protocol, each Party included in Annex I shall provide, for consideration by the Subsidiary Body for Scientific and Technological Advice, data to establish its level of carbon stocks in 1990 and to enable an estimate to be made of its changes in carbon stocks in subsequent years. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session or as soon as practicable thereafter, decide upon modalities, rules and guidelines as to how, and which, additional human-induced activities related to changes in greenhouse gas emissions by sources and removals by sinks in the agricultural soils and the land-use change and forestry categories shall be added to, or subtracted from, the assigned amounts for Parties included in Annex I, taking into account uncertainties, transparency in reporting, verifiability, the methodological work of the Intergovernmental Panel on Climate Change, the advice provided by the Subsidiary Body for Scientific and Technological Advice in accordance with Article 5 and the decisions of the Conference of the Parties. Such a decision shall apply in the second and subsequent commitment periods. A Party may choose to apply such a decision on these additional human-induced activities for its first commitment period, provided that these activities have taken place since 1990.

5. The Parties included in Annex I undergoing the process of transition to a market economy whose base year or period was established pursuant to decision 9/CP.2 of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Any other Party included in Annex I undergoing the process of transition to a market economy which has not yet submitted its first national communication under Article 12 of the Convention may also notify the Conference of the Parties serving as the meeting of the Parties to this Protocol that it intends to use an historical base year or period other than 1990 for the implementation of its commitments under this Article. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall decide on the acceptance of such notification.

6. Taking into account Article 4, paragraph 6, of the Convention, in the implementation of their commitments under this Protocol other than those under this Article, a certain degree of flexibility shall be allowed by the Conference of the Parties serving as the meeting of the Parties to this Protocol to the Parties included in Annex I undergoing the process of transition to a market economy.

7. In the first quantified emission limitation and reduction commitment period, from 2008 to 2012, the assigned amount for each Party included in Annex I shall be equal to the percentage inscribed for it in Annex B of its aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A in 1990, or the base year or period determined in accordance with paragraph 5 above, multiplied by five. Those Parties included in Annex I for whom land-use change and forestry constituted a net source of greenhouse gas emissions in 1990 shall include in their 1990 emissions base year or period the aggregate anthropogenic carbon dioxide equivalent emissions by sources minus removals by sinks in 1990 from land-use
change for the purposes of calculating their assigned amount.

8. Any Party included in Annex I may use 1995 as its base year for hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride, for the purposes of the calculation referred to in paragraph 7 above.

9. Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in

accordance with the provisions of Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period referred to in paragraph 1 above.

10. Any emission reduction units, or any part of an assigned amount, which a Party acquires from another Party in accordance with the provisions of Article 6 or of Article 17 shall be added to the assigned amount for the acquiring Party.

11. Any emission reduction units, or any part of an assigned amount, which a Party transfers to another Party in accordance with the provisions of Article 6 or of Article 17 shall be subtracted from the assigned amount for the transferring Party.

12. Any certified emission reductions which a Party acquires from another Party in accordance with the provisions of Article 12 shall be added to the assigned amount for the acquiring Party.

13. f the emissions of a Party included in Annex I in a commitment period are less than its assigned amount under this Article, this difference shall, on request of that Party, be added to the assigned amount for that Party for subsequent commitment periods.

14. Each Party included in Annex I shall strive to implement the commitments mentioned in paragraph 1 above in such a way as to minimize adverse social, environmental and economic impacts on developing country Parties, particularly those identified in Article 4, paragraphs 8 and 9, of the Convention. In line with relevant decisions of the Conference of the Parties on the implementation of those paragraphs, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, consider what actions are necessary to minimize the adverse effects of climate change and/or the impacts of response measures on Parties referred to in those paragraphs. Among the issues to be considered shall be the establishment of funding, insurance and transfer of technology.

APPENDIX V
THE LISTS OF CLIMATE-FRIENDLY GOODS AND SERVICES AND TECHNOLOGY TABLED BEFORE THE DOHA NEGOTIATIONS

[Source: World Bank, International Trade and Climate Change –Economic, Legal and Institutional Perspectives, (The World bank, 2008), pp 111-112]

Annex 6: Maximum and Applied Tariff Rates on Select Climate-Friendly Technologies

HS Code	Product Description	Maximum Average Bound Tariffs	Average Applied Tariff Rates	Maximum Average Bound Tariffs	Average Applied Tariff Rates
		Low- and Middle-Income WTO Members		High-Income WTO Members	
392010	PVC or polyethylene plastic membrane systems to provide an impermeable base for landfill sites and protect soil under gas stations, oil refineries, etc. from infiltration by pollutants and for reinforcement of soil	30	13	15	5
560314	Non-wovens, whether or not impregnated, coated, covered or laminated: of manmade filaments; weighing more than 150 g/m2 for filtering wastewater	33	14	16	4
701931	Thin sheets (voiles), webs, mats, mattresses, boards, and similar nonwoven products	34	13	17	4
730820	Towers and lattice masts for wind turbine	28	10	16	3
730900	Containers of any material, of any form, for liquid or solid waste, including for municipal or dangerous waste.	32	12	17	4
732111	Solar driven stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, of iron or steel	36	18	15	5
732190	Stoves, ranges, grates, cookers (including those with subsidiary boilers for central heating), barbecues, braziers, gas-rings, plate warmers and similar non-electric domestic appliances, and parts thereof, of iron or steel—Parts	36	14	15	4
732490	Water saving shower.	28	19	17	4
761100	Aluminium reservoirs, tanks, vats and similar containers for any material (specifically tanks or vats for anaerobic digesters for biomass gasification)	31	11	16	4
761290	Containers of any material, of any form, for liquid or solid waste, including for municipal or dangerous waste	31	13	14	4
840219	Vapor generating boilers, not elsewhere specified or included hybrid	24	5	15	4
840290	Super-heated water boilers and parts of steam generating boilers	21	5	15	4
840410	Auxiliary plant for steam, water, and central boiler	25	5	15	3
840490	Parts for auxiliary plant for boilers, condensers for steam, vapor power unit	25	4	16	3
840510	Producer gas or water gas generators, with or without purifiers	24	5	13	2
840681	Turbines, steam and other vapor, over 40 MW, not elsewhere specified or included	28	5	13	3
841011	Hydraulic turbines and water wheels of a power not exceeding 1,000 kW	24	4	15	3

841090	Hydraulic turbines and water wheels; parts, including regulators	24	4	15	3
841181	Gas turbines of a power not exceeding 5,000 kW	20	5	13	2
841182	Gas turbines of a power exceeding 5,000 kW	20	5	13	2
841581	Compression type refrigerating, freezing equipment incorporating a valve for reversal of cooling/heating cycles (reverse heat pumps)	29	13	16	4
841861	Compression type refrigerating, freezing equipment incorporating a valve for reversal of cooling/heating cycles (reverse heat pumps)	21	7	17	4
841869	Compression type refrigerating, freezing equipment incorporating a valve for reversal of cooling/heating cycles (reverse heat pumps)	21	7	16	4
841919	Solar boiler (water heater)	27	10	17	4
841940	Distilling or rectifying plant	23	4	15	3
841950	Solar collector and solar system controller, heat exchanger	24	5	15	3
841989	Machinery, plant or laboratory equipment whether or not electrically heated (excluding furnaces, ovens etc.) for treatment of materials by a process involving a change of temperature such a heating, cooking, roasting, distilling, rectifying, sterilizing, steaming, drying, evaporating, vaporizing, condensing or cooling.	25	6	12	3
841990	Medical, surgical or laboratory stabilizers	24	6	12	2
848340	Gears and gearing and other speed changers (specifically for wind turbines)	22	8	16	3
848360	Clutches and universal joints (specifically for wind turbines)	23	9	15	3
850161	AC generators not exceeding 75 kVA (specifically for all electricity generating renewable energy plants)	27	7	15	3
850162	AC generators exceeding 75 kVA but not 375 kVA (specifically for all electricity generating renewable energy plants)	26	7	16	3
850163	AC generators not exceeding 375 kVA but not 750 kVA (specifically for all electricity generating renewable energy plants)	26	5	16	3
850164	AC generators exceeding 750 kVA (specifically for all electricity generating renewable energy plants)	28	5	16	3
850231	Electric generating sets and rotary converters; wind-powered	26	5	16	3
850680	Fuel cells use hydrogen or hydrogen-containing fuels such as methane to produce an electric current, through a electrochemical process rather than combustion	25	18	16	3
850720	Other lead acid accumulators	24	16	16	5
853710	Photovoltaic system controller	26	10	17	3
854140	Photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light emitting diodes	21	4	9	1
900190	Mirrors of other than glass (specifically for solar concentrator systems)	30	7	16	3
900290	Mirrors of glass (specifically for solar concentrator systems)	29	12	18	3
903210	Thermostats	33	7	14	3
903220	Manostats	33	6	13	2

APPENDIX VI

COMMUNICATIONS WITH THE WTO SECRETARIAT STAFF ON THE NEGOTIATING HISTORY OF GPA ARTICLES III AND XXIII

From: Garba Malumfashi <gmalumfashi@yahoo.co.uk>
To: "Anderson, Robert"[994] <Robert.Anderson@wto.org>

Dear Mr Anderson,

Best greetings to you. I'm writing to remind you of my inquiry, as fowarded to you earlier by Andrea, regarding aspects of the negotiation history of GPA Article III (especially why it does not use the term "like") and Article XXIII (on why it does not have an equivalent of GATT Article XX(g)). I foresee you having very busy schedules. I'm however still hopeful that you will squeeze a few moments for me on this.

Kind regards

Garba
GI Malumfashi
PhD Research Fellow (PTDF, Nigeria/NCCR-WTI, University of Bern, Switzerland)
(The Global Regimes for Climate Change, Energy and Trade)
Centre for Energy, Petroleum and Mineral Law and Policy (CEPMLP)
University of Dundee
United Kingdom
(0044 7828 797848 -mobile)
----- Forwarded Message ----
From: "Mastromatteo, Andrea" <Andrea.Mastromatteo@wto.org>
To: Garba Malumfashi <gmalumfashi@yahoo.co.uk>
Cc: "Anderson, Robert" <Robert.Anderson@wto.org>; "Boyle, Cathy" <Cathy.Boyle@wto.org>
Sent: Thursday, 28 May, 2009 9:20:41
Subject: RE: the Agreement on Trade in Civil Aircraftt
Dear Garba,

I am forwarding your inquiry to Robert Anderson, who is the Secretary to the Committee on Government Procurement. He may be able to respond to your questions.

Best regards,
Andrea Mastromatteo
Rules Division
World Trade Organization
154 rue de Lausanne
1211 Geneva 21
Switzerland
email : andrea.mastromatteo@wto.org
office : +41-22-739-6860
fax : +41-22-739-5909

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[994] Robert Anderson was the Secretary to the WTO Committee on Government Procurement (CGP) as at the time of this communication. Mr Anderson never acknowledged or, in any way, responded to any of these emails.

-----Original Message-----
From: Garba Malumfashi [mailto:gmalumfashi@yahoo.co.uk]
Sent: 28 May 2009 04:05
To: Mastromatteo, Andrea
Subject: Fw: the Agreement on Trade in Civil Aircraftt
Dear Andrea,

Greetings to you. It is Garba again. This time it is request for guidance for sources of information on the negotiating history of the GPA 1994.

For instance, I'm curious about why Article III of the the GPA on non-discrimination did not use the term "like" in probiting discriminatory procurement practices for products or services. Similarly, Article XXIII on general exceptions did not include measures taken for "conservation of exhaustible natural resources", namely the equivalent of GATT Article XX (g).

These are some of the issues I'm currently addressing in my PhD. I thought I could find some guidance from the negotiating history of these provisions.

I'm confident this information is available on the WTO website, otherwise on some printed form. However, as yet, I'm unable to lay my hands on anything in this regard. Even the *"Reshaping the World Trading System -The History of the Uruguay Round"* by John Croom, does not say much on this.

Kindly oblige.

Best.

Garba
GI Malumfashi

----- Forwarded Message ----
From: Garba Malumfashi <gmalumfashi@yahoo.co.uk>
To: "Mastromatteo, Andrea" <Andrea.Mastromatteo@wto.org>
Cc: Susan Brown <susan.brown@wti.org>
Sent: Monday, 30 March, 2009 18:17:29
Subject: Re: the Agreement on Trade in Civil Aircraft
Dear Andrea,

I'm very grateful indeed!

Best wishes.

Garba

From: "Mastromatteo, Andrea" <Andrea.Mastromatteo@wto.org>
To: Garba Malumfashi <gmalumfashi@yahoo.co.uk>
Sent: Monday, 30 March, 2009 16:31:26
Subject: RE: the Agreement on Trade in Civil Aircrafts

Dear Garba,

I can confirm that the TCA Agreement is still operational. There are 30 Signatories: Canada, the European Communities(with the following 20 EC Member States Signatories in their own right: Austria, Belgium, Bulgaria, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Spain, Sweden and the United Kingdom), Egypt, Georgia, Japan, Macao China, Norway, Switzerland, Chinese Taipei and the United States. WTO Members with observer status are: Argentina, Australia, Bangladesh, Brazil, Cameroon, China, Colombia, Gabon, Ghana, India, Indonesia,

Israel, the Republic of Korea, Mauritius, Nigeria, Oman, Saudi Arabia, Singapore, Sri Lanka, Trinidad and Tobago, Tunisia and Turkey. In addition the Russian Federation is also an observer. The IMF and UNCTAD sare also observers.

I hope this helps.

Best regards,

Andrea Mastromatteo
Rules Division
World Trade Organization
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1211 Geneva 21
Switzerland
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office : +41-22-739-6860
fax : +41-22-739-5909

-----Original Message-----
From: Garba Malumfashi [mailto:gmalumfashi@yahoo.co.uk]
Sent: 30 March 2009 10:48
To: Mastromatteo, Andrea
Subject: Fw: the Agreement on Trade in Civil Aircrafts

Dear Andrea,

My name is Garba, now about concluding my PhD programme on interaction of green government procurement policies, climate change and the GPA. I sent an enquiry to your colleague, Mireille, but she advised that you would be in a better position to assist me. You sure will be very busy, but kindly see it below and assist if possible.

Kind regds.

garba

----- Forwarded Message ----
From: Garba Malumfashi <gmalumfashi@yahoo.co.uk>
To: mireille.cossy@wto.org
Sent: Sunday, 29 March, 2009 2:54:13
Subject: the Agreement on Trade in Civil Aircrafts

Dear Mireille,

Best greetings to you, again. I just want ot ask if you have any official information as to the current status of the Agreement on Trade in Civil Aircraft, one of the 4 plurilateral agreements. I know of the expiration of the Dairy and bovine meat agreements. I was informed informally that the only functional of the 4 is the GPA (which, as you know, is the subject-matter of my PhD). I have a statement somewhere in the thesis on the status of all the other plurilateral agreements.

Thanks for your help in advance.

Garba.

----- Forwarded Message ----
From: Garba Malumfashi <gmalumfashi@yahoo.co.uk>
To: mireille.cossy@wto.org

Sent: Thursday, 19 February, 2009 21:18:04
Subject: thanks a lot

Dear Mireille,

This is Garba, Melaku's student from CEPMLP, Dundee. Just to say thanks a lot once again for your talk to us, last week, on Energy and WTO. It was indeed a very exciting and comprehensiveness talk. And I said to you after the talk, I had wished to hear you talk of climate change and its impact on WTO also as part of the issues raising the profile of energy in the WTO. However, as you said there was not time to touch on everything.

Just to tell you, my PhD research currently is on interrelationship of (green) government procurement, climate change and the WTO GPA. I'm in my last yr now hoping to conclude by July latest. I'm also still with WTI as research fellow.

Hope we have another opportunity to see again.

Best.

Garba

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